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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

No. [redacted] 56

SMITH-DOUGLASS COMPANY, INC.,
Petitioner,

vs.

THE UNITED STATES

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

No. 732

SMITH-DOUGLASS COMPANY, INC.,
Petitioner,

vs.

THE UNITED STATES

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Smith-Douglass Company, Inc., Petitioner, prays that a writ of certiorari issue to review the judgment of the United States Court of Claims entered in the above-entitled cause on December 1, 1953, adhering to and reaffirming its judgment of December 6, 1948.

Opinions Below

The opinion of the Court of Claims rendered on December 6, 1948, is reported in 81 F. Supp. 215. The opinion of the Court of Claims rendered on December 1, 1953, reaffirming the decision of December 6, 1948, is reported in 116 F. Supp. 570.

Jurisdiction

The original judgment of the Court of Claims was entered on December 6, 1948 (R. 12). The judgment of the Court of Claims, on remand, reaffirming the decision of December 6, 1948, was entered on December 1, 1953 (R. 47). The time allowed petitioner for filing a petition for a writ of certiorari was extended by this Court to and including April 30, 1954. The jurisdiction of this Court is invoked under Title 28, U.S.C. § 1255.

Questions Presented

I. Was the constitutional requirement of just compensation for the requisitioning for title of petitioner's vessel *International* on October 6, 1943 satisfied by the determination of the Court below that the fair and reasonable value of the *International* and its equipment and spare parts on October 6, 1943 was $290,000 or "substantially the April 1942 market value" for comparable ships, when, by the Court's own findings, the April 1942 market value had been intentionally depressed by the Government under the Ship Warrants Act of July 14, 1941 for the express purpose of requisitioning vessels at prices lower than those prevailing before the enactment of that Act?

II. Assuming, *arguendo,* that the requirement of just compensation under the Fifth Amendment is satisfied by a value based upon a market value which had been intentionally depressed for the express purpose of requisitioning this and other vessels, is the requirement of just compensation satisfied in the instant case by the value determined for petitioner's vessel *as of October 6, 1943,* which was based upon the sale of only one comparable vessel in April 1942, eighteen months prior to the date petitioner's vessel was requisitioned?

III. Assuming that the intentionally depressed market of April 1942 is not a fair measure of just compensation under the Fifth Amendment, or that the single sale of a comparable vessel in April 1942 did not constitute a fair measure of just compensation for the requisitioning of petitioner's vessel on October 6, 1943, should not the fair and reasonable value of petitioner's vessel *International* be determined on the basis of other criteria which were before the Court below and which have been approved by this Court and other federal courts, including reproduction cost new less depreciation, the cost of the vessel to petitioner in 1941, appraisals for insurance, and opinions of experts?

Statutes Involved

The statutes involved are the Fifth Amendment to the Constitution of the United States, Section 902(a) and (d) of the Merchant Marine Act of 1936, as amended, 53 Stat. 1255, 46 U. S. C. § 1242, and the Ship Warrants Act of July 14, 1941, c. 297, 55 Stat. 591, 50 War Appendix U. S. C. § 1281 *et seq.*

The pertinent portion of the Fifth Amendment to the Constitution is as follows:

> "• • • nor shall private property be taken for public use, without just compensation."

Section 902(a) and (d) of the Merchant Marine Act of 1936, as amended, 53 Stat. 1255, 46 U. S. C. § 1242, and the pertinent portions of the Ship Warrants Act of July 14, 1941, c. 297, 55 Stat. 591, 50 War Appendix U. S. C. § 1281 et seq. are set forth in the Appendix *infra*, pages 25-27.

Statement

On January 19, 1945, petitioner filed suit in the United States Court of Claims, pursuant to Section 902(d) of the

Merchant Marine Act of 1936, as amended, *supra*, to recover the balance of just compensation due it from respondent for the requisitioning of its oceangoing dry-cargo vessel *International* (R. 1).

The *International* was built in 1919 as a dry-cargo vessel of 4,370 deadweight tons at a cost of $856,000 (R. 12). In 1928 it was converted to a floating cannery. On April 24, 1941, petitioner purchased the *International* for use in its own business for a total consideration of approximately $303,112, equivalent to $69.36 per deadweight ton (R. 14-15). After the vessel was delivered to petitioner in September 1941, it was reconverted from a floating cannery to a dry-cargo vessel at a cost of approximately $64,000 (R. 15). Between the time it was reconverted to a dry-cargo vessel and the time it was requisitioned by respondent, "repairs, renewals, reconditionings, and similar maintenance work were performed on the vessel * * * at an aggregate cost of approximately $60,000" which "maintained the vessel in a very good state of repair and had a favorable influence on its probable useful life" (R. 15). The total cost of the vessel to petitioner, including reconversion and reconditioning, amounted to $427,112, equivalent to $97.74 per deadweight ton.

The *International's* reconversion from a floating cannery to a dry-cargo vessel was completed in November 1941, at which time respondent notified petitioner that it had urgent need of the vessel, with the result that at no time was petitioner ever allowed to use the vessel in its own business (R. 15). From November 1941 to June 6, 1942, at the direction of the Maritime Commission, the vessel was chartered either to other companies or to the Government pursuant to the orders of and at rates fixed by the Maritime Commission (R. 19). On June 6, 1942, the *International* was requisitioned for use by the War Shipping

Administration (R. 16).[1] On October 6, 1943 the War Shipping Administration, pursuant to Section 902(a) of the Merchant Marine Act of 1936, as amended, *supra*, requisitioned title to the vessel, together with all spare parts and equipment (R. 20).

On and before the *International* was requisitioned for use on June 6, 1942, it was insured by petitioner for $425,000 (R. 16). After it was requisitioned for use, it was insured by the War Shipping Administration for $298,200, which amount was not considered adequate by petitioner which carried additional insurance of $125,000 at its own expense, making the aggregate insurance $423,200 for the period from June 6, 1942 to October 6, 1943 (R. 16).

The reproduction cost of building a ship identical to the *International* on October 6, 1943 was $1,171,000 (R. 17). On that date the *International* was twenty-four years and two months old, and the remaining physical capacity of the vessel to operate in the service for which it was best adapted was more than ten years (R. 17). Based upon the reproduction cost of $1,171,000, depreciated at the rate of four per cent per annum on annually diminishing balances, the depreciated reconstruction cost of the vessel as of October 6, 1943 was $436,678.17 (R. 17).

The prices of United States-flag oceangoing dry-cargo vessels comparable to the *International*, based on domestic sales to American buyers, fluctuated from the outbreak of the European war in September 1939 until after the German conquest of the Low Countries and the fall of France

[1] Section 902(a) of the Merchant Marine Act of 1936, as amended, authorizes the United States Maritime Commission, during a national emergency declared by proclamation of the President, to requisition the ownership or use of vessels owned by citizens of the United States. The requisitioning functions, duties and powers of the Commission were transferred on February 7, 1941, by Executive Order No. 9054, to the Administrator, War Shipping Administration, a war agency established by the same order (7 Fed. Reg. 837).

in the Spring and early Summer of 1940, although during that period prices increased somewhat (R. 54). From August 1940, prices steadily increased until they reached their peak in June 1941, and they tended downward after that date (R. 56). The Court below found that "The decline in the price of ships after June 1941 was the result, and the intended result, of the passage of the Ship Warrants Act of July 14, 1941, 55 Stat. 591, which authorized the President to delegate to the Maritime Commission the power to exercise close control over American merchant ships with regard to the trades in which they should engage, the voyages to be undertaken, the class of cargo to be carried, the charter hire to be charged, and other things." (R. 49). The Court also found that "the Government's deliberate and successful effort to depress the price of ships" (R. 53) by "controlling their rates, routes, and types of cargo" (R. 52) resulted in a decline in sound-condition market price from $88.50 per deadweight ton in June 1941 to $60.00 per deadweight ton in April 1942 (R. 52, 54), and further, that the Maritime Commission pursued a policy of delaying the requisition of vessels until this price decline could be brought about (R. 54). In April 1942 the War Shipping Administration destroyed the market by ordering the requisition for use of practically the entire oceangoing merchant fleet of the United States (R. 55). From that time until the requisition for title of petitioner's vessel on October 6, 1943, there was no free market for such ships (R. 54).

On July 28, 1944, the War Shipping Administrator, acting on behalf of the War Shipping Administration, determined that petitioner was entitled to the sum of $236,018.78 as just compensation for the *International*, its spare parts and equipment (R. 12). On October 7, 1944, petitioner rejected the offer (R. 12). On November 20, 1944, the Government paid petitioner the sum of $177,014.07, be-

ing seventy-five per cent of the amount determined by the Administrator, petitioner reserving the right to sue the Government for such further sum as would constitute just compensation for the vessel (R. 12).

On January 19, 1945, petitioner filed its petition in the Court of Claims to recover just compensation for its vessel (R. 1). In his report filed March 22, 1948, the Commissioner of the Court of Claims found that the fair and reasonable value of the *International* on October 6, 1943 was $434,445.99, or $99.42 per deadweight ton, based upon the depreciated reproduction cost of $436,678.17 as of October 6, 1943, plus $15,442.82 for the extra equipment and spare parts, less $17,675 for needed repairs as of the date of title requisition (R. 11). The Commissioner also found that "There were no sales of comparable ships between willing sellers and willing buyers for a year and one-half prior to October 6, 1943, from which the market value of the vessel on the date of requisitioning [could] be determined" (R. 10). In its decision of December 6, 1948, the Court of Claims applied a standard of valuation different from that used by the Commissioner, and held that the fair and reasonable value of the *International* and its equipment and spare parts on October 6, 1943, was $290,000, of which $15,442.82 represented the value of equipment and spare parts, leaving $274,557.18, or $62.83 per deadweight ton, as the fair and reasonable value of the vessel itself (R. 17). The Court also found that at the time of title requisition the vessel was in need of repairs at the reasonable cost of $17,675, so that the sound condition value of the ship was $292,232.18, or $66.87 per deadweight ton, exclusive of spare parts and equipment (R. 17).

Following that decision and the decision of this Court in the case of *United States* v. *Cors*, 337 U. S. 325 (June 13, 1949), both petitioner and the Government filed motions

for a new trial, petitioner contending that the award was inadequate and the Government claiming that the award included "deductible enhancement" which was required to be excluded under the "enhancement clause" of Section 902(a) of the Merchant Marine Act of 1936, as amended, *supra*. On October 3, 1949, without referring specifically to either motion, the Court of Claims ordered the case remanded to the Commissioner "for the purpose of receiving evidence as to what amount, if any, should be deducted from the valuation heretofore found by this court to bring the valuation into compliance with the decision of the Supreme Court in the *Cors* case * * *" (R. 23-25).

On August 4, 1952, the Commissioner filed his report, stating that no element of "deductible enhancement" was included in the amount previously determined by the Court of Claims (R. 25). On December 1, 1953, the Court of Claims handed down its decision, on remand, adhering to and reaffirming its former judgment of December 6, 1948 (R. 47). In its decision, the Court below stated that "The value of $290,000 which we formerly fixed for the plaintiff's ship and its equipment and spare parts was substantially the April 1942 market value, with some addition because of the better-than-average condition of the ship" and that no element of "deductible enhancement" was included in the April 1942 market value (R. 53).

Specification of Errors to Be Urged

1. The Court below erred in using as a measure of just compensation for petitioner's vessel *International*, the April 1942 market value of comparable vessels which, according to the Court's own findings, had been intentionally depressed under the Ship Warrants Act, *supra*, for the express purpose of permitting the Government to requisition

ships at prices lower than the prices prevailing prior to the enactment of the Act.

2. The Court below erred in using the April 1942 value as a measure of just compensation for the taking of petitioner's vessel *International* on October 6, 1943, because that value was based upon the sale of only one comparable vessel made eighteen months prior to the date of the requisition.

3. The Court below erred in failing to follow the other relevant guideposts for valuation which were before the Court below and which this Court and other federal courts have held should be used when market value cannot be determined by sufficient sales of comparable property made in a free market at or about the time of taking, namely, depreciated reconstruction cost, acquisition cost, improvements, appraisals for insurance, and testimony of experts.

Reasons for Granting the Writ

I

This case presents squarely the constitutional question of whether the Federal Government may deliberately depress the price of private property for the express purpose of requisitioning such property at a lower price than it would otherwise be required to pay, and then, upon the subsequent requisitioning of that property, use the depressed price as the measure of just compensation. Is the depressed price a fair measure of just compensation under the Fifth Amendment to the Constitution of the United States?

The Court below specifically found that by means of the Ship Warrants Act of July 14, 1941, *supra,* the Government intentionally depressed the market value of ships for the express purpose of subsequently requisitioning the ships

at the deliberately depressed price, as indicated by the following excerpt from its findings of fact in this case (R. 54):

> "The decline in market values after June 1941 was caused by the passage of the Ship Warrants Act of July 14, 1941, and the consequent and immediate reduction of freight rates and imposition of other controls by the Maritime Commission.
>
> "The Maritime Commission pursued a policy of delaying the requisition of vessels, as outlined in the following passage from the formal statement made on June 10, 1943, by its Chairman to the Committee on the Merchant Marine and Fisheries, House of Representatives, Seventy-eight Congress, First Session:
>
> > However, even if the Maritime Commission had the power to requisition before May of 1941, the exercise of that power during the high market conditions of late 1940 and early 1941 would have been most unwise and unfortunate, since the owners would then have been in a position to file suit in the Court of Claims for the full market values of that peak period. The results of such premature requisitioning would therefore have been very costly to the United States. *The only sound strategy was to delay the date of requisitioning as we did until rates and values could be reduced to more moderate levels.*
> >
> > *Under the circumstances, the Maritime Commission determined not to resort to requisition,* even after May 27, 1941, but to continue operations under private ownership *until such time as its efforts to reduce and stabilize rates and values should produce results* or the need for requisitioning should become clearer and more pressing.
> >
> > In April 1942 the War Shipping Administration ordered the requisition for use of practically the entire oceangoing merchant fleet of the United States." (Emphasis supplied.)

In its opinion, the court below referred to the same point as follows (R. 49):

"* * * The decline in the price of ships after June 1941 was the result, and the intended result, of the passage of the Ship Warrants Act of July 14, 1941, 55 Stat. 591, which authorized the President to delegate to the Maritime Commission the power to exercise close control over American merchant ships with regard to the trades in which they should engage, the voyages to be undertaken, the class of cargo to be carried, the charter hire to be charged, and other things. By making use of these powers, the Maritime Commission stopped the rise in the price of ships, since owners could no longer pick the most profitable routes or cargo, nor charge the high rates which they had been charging, and the prospects of large earnings no longer existed. Further, in April 1942, the War Shipping Administration ordered the requisition for use, though not for title, of practically the entire ocean-going merchant fleet of the United States. From that time until the requisition for title of the plaintiff's ship in October 1943, there was, of course, no free market for ships."

Again in its opinion, the court below stated (R. 52):

"As we have said, the Government, through the means of the Ship Warrants Act of July 14, 1941, supra, deliberately depressed the price and value of merchant ships by controlling their rates, routes, and types of cargo. Within less than a year, prices fell from $88.50 to $60.00 a ton. * *"* (Emphasis supplied.)

The constitutional question presented by the instant case has never been passed upon by this Court. However, this Court has recognized that the situation in this case is entirely different from that where the Government requisitions property at prices which have been fixed at going market rates under valid statutory authority with the primary motive, not of requisitioning that property for the Government's own use as in this case, but of regulating transactions among the public generally for the purpose of

preventing inflation. Thus, in his concurring opinion in *United States* v. *John J. Felin & Co.*, 334 U. S. 624, 646 (1948), Mr. Justice Reed stated:

> "If the Government fixed prices with the predominant purpose of acquiring property affected by its order, a different situation would be presented. Here we have a price regulation of meat products on a national scale with judicial review of those regulations. The Government sought for itself no unique opportunity to purchase."

In *United States ex rel. T. V. A.* v. *Powelson*, 319 U. S. 266, 284 (1943), this Court had previously stated:

> "* * * The United States no more than a state can be excused from paying just compensation measured by the value of the property at the time of the taking merely because it could destroy that value by appropriate legislation or regulation. * * *"

In the instant case the Court of Claims held that the amount of just compensation to which petitioner was entitled for its ship and its equipment and spare parts was $290,000, which "was substantially the April 1942 market value, with some addition because of the better-than-average condition of the ship" (R. 53). The April 1942 market value of ships comparable to petitioner's vessel does not represent the fair and reasonable value of the International on October 6, 1943, and for the following reasons cannot be properly taken as the measure of just compensation to which petitioner is entitled:

1. The Court below found that the decline in market value of ships comparable to the *International* between June 1941, when a peak of $88.50 per deadweight ton was reached, and April 1942, when the level had been decreased to $60.00 per deadweight ton, was brought about by the manner in which the Maritime Commission made use of the

powers entrusted to it under the Ship Warrants Act of July 14, 1941, *supra* (R. 49). The Court found that the decline in market value was deliberately caused by the Commission for the primary purpose of enabling the Government to take the vessels at the values thus depressed and that the Government intentionally delayed the requisitioning of ships until the April 1942 level had been reached (R. 54). The Court further found that in April 1942 the War Shipping Administration destroyed the market for such ships by ordering the requisition for use of practically the entire oceangoing merchant fleet of the United States (R. 55).

Notwithstanding these findings, the Court of Claims held that the measure of just compensation to which petitioner was entitled was "substantially the April 1942 market value" (R. 53). Such a holding is directly contrary to and irreconcilable with the proposition stated by that Court in *Edward P. Stahel & Co., Inc., et al* v. *United States,* 111 C. Cls. 682, 743 (1948), that "the Government may not set a ceiling price below the market price for the purpose of keeping down the amount which an owner shall be paid where his property is subsequently taken for public use."

The situation in the instant case is clearly to be distinguished from that in *United States* v. *Commodities Trading Corp., et al,* 339 U. S. 121 (1950), where the first ceiling price on pepper was not an artificially depressed price, but was fixed by the O. P. A. on December 11, 1941 at approximately the fair market price as of that date (113 C. Cls. 244, 249-251, Special Findings 9, 10 and 11), for the purpose of protecting the public economy against inflation and not for the purpose of enabling the Government to take the property at a drastic reduction from its fair market value (339 U. S. at 125).

2. Unlike other emergencey control statutes which this Court has ruled upon, the Ship Warrants Act, *supra,* and

the regulations and orders promulgated thereunder failed to prescribe any standards or guides for the determination of fair value in driving down charter rates and ship prices. For example, under the Emergency Price Control Act of 1942, as amended, 56 Stat. 23, c. 26, 50 War Appendix U. S. C. § 901, *et seq.*, as this Court found in *Yakus* v. *United States*, 321 U. S. 414, 423 (1944), Congress laid down standards and criteria "to guide the administrative determination of both the occasions for the exercise of the price-fixing power, and the particular prices to be established." These factors were also pointed out by this Court in upholding the validity of the Act in *Bowles* v. *Willingham*, 321 U. S. 503, 513-514 (1914). In *Lichter* v. *United States*, 334 U. S. 742 (1948), the constitutionality of the Renegotiation Act of 1942, as amended, 56 Stat. 245, 50 War Appendix U. S. C. § 1191, was upheld on the ground that the statutory standard was sufficiently definite to support the delegation of power to administrative officials to determine whether there had been "excessive profits". In contrast, in *Schechter* v. *United States*, 295 U. S. 495 (1935), this Court held that the National Industrial Recovery Act of 1933, c. 90, 48 Stat. 195, was invalid because it failed to set up standards sufficient to satisfy constitutional requirements.

Moreover, the depressed prices and values resulting from the use of the Ship Warrants Act, *supra*, by the Maritime Commission and the War Shipping Administration are completely irrelevant to the detemination of just compensation because neither the Act nor the agencies administering it made any pretense of complying with even the most rudimentary requirements of due process of law. There were no provisions whatever for notice, hearings, findings supported by substantial evidence, or review. In short, no administrative or judicial remedy was available, except the remedy now being pursued by petitioner in this

case. Again, this case is to be distinguished from *United States* v. *Commodities Trading Corp., et al, supra,* where this Court found that as assurance that prices fixed by the administrative agency under the authority of the Emergency Price Control Act "would be 'generally fair and equitable,' Congress provided that price regulations could be subjected to judicial review" (339 U. S. at 124).

The instant case aptly illustrates the abuses which, in the *Lichter* case, *supra,* this Court recognized could occur when large powers are vested in administrative officials by wartime legislation. In that case, this Court said: "We re-emphasize that, under these conditions, there is great need both for adequate channels of procedural due process and for careful conformity to those channels" (334 U. S. at 754).

In summary, a Government agency has no right to deliberately destroy, in whole or in part, the market value of property which it admittedly intends to requisition, and then, upon requisition months later, to invoke the deliberately depressed price as the limit of its constitutional obligation to pay just compensation for the property taken. The sanction given this course of action by the Court below violates the Constitutional requirement of just compensation for the taking of private property for public use, and should be corrected by this Court.

II

The April 1941 market value of $60.00 per deadweight ton was not evidence of the value of the International on October 6, 1943, because there were not a sufficient number of sales of comparable vessels made at that time to be used as a measure of just compensation and because any sales made at that time were too remote from the date of the *International's* requisition for title to be considered in determining the vessel's value "at or about the time of

taking" (Rule 3 of the Advisory Board on Just Compensation, *infra*, page 18).

The record shows that in April 1942 there was only one sale of a vessel comparable to the *International*, and that there were only four such sales between July 14, 1941, when the Ship Warrants Act was passed, and April 1942, when the market was destroyed by the War Shipping Administration's order requisitioning for use practically the entire United States merchant fleet.[2]

The Courts have recognized that a small number of sales does not establish a market value for the purpose of determining just compensation. In the case of *De La Rama S. S. Co., Inc.* v. *United States*, 206 F. (2d.) 651, 655 (C. A. 2, 1953), in determining the value of a vessel lost on December 25, 1942, the court stated that three sales, two in the Fall of 1941 and one in January 1942, were not enough to establish a market. In *United States* v. *Toronto, Hamilton & Buffalo Navigation Co.*, 338 U. S. 396, 402 (1949), this Court said:

> "At times, however, peculiar circumstances may make it impossible to determine a 'market value'. There may have been, for example, so few sales of similar property that we cannot predict with any assurance that the prices paid would have been repeated in the sale we postulate of the property taken. We then say that there is 'no market' for the property in question. * * *"

In the instant case, the sale in April 1942 of a single vessel comparable to the International was insufficient to con-

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[2] The market value per deadweight ton of $60.00 found by the Court below to be the April 1942 sound condition value of comparable vessels (R. 54) was based upon the sale of only one vessel, the Wm. J. Salman. This is shown by respondent's own exhibits (Defendant's Exhibits R-3C and R-5 for identification).

stitute a "market" for the purpose of determining just compensation. Moreover, in point of time, the April 1942 sale was too remote from the date of the International's *requisition for title to be used as a measure of the vessel's value "at or about the time of taking".*

III

In the absence of a free market for ships comparable to the *International* at or about the time of taking on October 6, 1943, the failure of the Court below, in determining just compensation, to give due regard to the other guideposts of valuation which were before it, was in conflict with the decisions of this Court and other federal courts, and was a complete disregard of the standards of valuation prescribed under the rules formulated by the Advisory Board on Just Compensation for guidance in determining just compensation.[3]

Petitioner recognizes that the primary test usually applied by the courts in determining just compensation is market value. For the reasons previously stated, the market prices of comparable ships between July 1941 and April 1942 could not lawfully be considered in determining the fair and reasonable value of the *International* on October 6, 1943, and there were no free sales of such ships after April 1942. When there is no reliable market at or about the time of taking, to what standard of value shall resort then be had?

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[3] By Executive Order 9387, issued October 15, 1943, 8 Fed. Reg. 14105, 3 CFR 1943, Supp. 48, 49, the President of the United States established an Advisory Board on Just Compensation, the function of which was to establish fair and equitable standards, rules and formulae of general applicability for the guidance of the War Shipping Administration in determining the just compensation to be paid for all vessels requisitioned by the Administration. On December 7, 1943, the Board submitted its report containing the rules which it had formulated for the purpose of determining just compensation (1943 AMC 1443, 1444).

The Fifth Amendment, which provides that private property shall not be taken for public use without just compensation, contains no definite standards of fairness by which the measure of "just compensation" is to be determined. *United States* v. *Cors, supra,* 337 U. S. at 332. In *Standard Oil Co.* v. *Southern Pacific Co.,* 268 U. S. 146, 155 (1925), involving the valuation of the vessel *Proteus,* this Court stated:

> "• • • Where there is no market value such as is established by contemporaneous sales of like property in the way of ordinary business, as in the case of merchandise bought and sold in the market, other evidence is resorted to. • • •"

This principle is likewise succinctly set forth in Rule 3 of the Advisory Board on Just Compensation, cited with approval by this Court in *United States* v. *Toronto, Hamilton & Buffalo Navigation Co., supra,* 338 U. S. at 404, which is as follows:

> "Rule 3. —Where market value cannot be determined by *sufficient sales,* or hirings of vessels of like character, *made at or about the time of taking,* it is to be determined by the Administrator from a consideration of cost of construction, acquisition cost so far as relevant, improvements, replacement costs, depreciation, earnings, physical condition, appraisals for insurance or other purposes, and any other relevant facts upon which a reasonable judgment as to value can be based. These various matters are to be given such weight by the Administrator, as in his opinion they are justly entitled to, in determining the price that would probably result from fair negotiations between an owner willing to sell and a purchaser desiring to buy." (Emphasis supplied.)

1. This Court and other federal courts are in accord with the rule that reproduction cost, less depreciation, is one

of the principle gauges of value when market price is absent. *The Proteus, supra,* 268 U. S. at 155-156; *The Hisko* [*Almirante S. S. Corporation* v. *United States*], 54 F. (2d.) 540, 541 (C. A. 2, 1931); *The Manhattan* [*United States* v. *Atlantic Refining Co. et al.*], 10 F. Supp. 45, 47 (1935), affirmed 85 F. (2d.) 427 (C. A. 3, 1936), certiorari denied 300 U. S. 654 (1937); *The President Madison* [*American Mail Line, Ltd.* v. *Skagit River Navigation & Trading Co., et al.*], 91 F. (2d) 835, 845 (C. A. 9, 1937); *The Petar* [*Ozanic* v. *United States*], 165 F. (2d.) 738, 740-741 (C. A. 2, 1948); *Wilson Line, Inc.* v. *United States,* 111 C. Cls. 764, 779 (1948); *De La Rama S. S. Co.* v. *United States, supra,* 206 F. (2d.) at 655.

Reproduction cost, less depreciation, although not the sole guide in determining the value of a ship in the absence of a market (*The Proteus, supra,* 268 U. S. at 156), is one that nevertheless may be deemed a reliable indication of the minimum value. *The Hisko, supra,* 54 F. (2d.) at 541; *The Petar, supra,* 165 F. (2d.) at 741. As was stated by the court in *De La Rama S. S. Co.* v. *United States, supra,* 206 F. (2d.) at 655, "Reconstruction cost less depreciation is an accepted guide to lead the way to the determination of the value of a vessel when market value cannot be shown."

The Commissioner found, and the Court below agreed, that on October 6, 1943, the reproduction cost of an exact duplicate of the *International* was $1,171,000, and that the remaining useful life of the vessel to operate in the service for which it was best adapted was more than ten years (R. 10, 17). Based upon this reproduction cost, depreciated at the rate of four per cent per annum on a diminishing balance for twenty-four years and two months, the interval between the time of construction and the time of taking, both the Commissioner and the Court below found that the depreciated

reconstruction cost of the vessel on October 6, 1943, was $436,678.17 (R. 11, 17). On the basis of that depreciated reproduction cost, plus the value of the spare parts and equpment of $15,442.82, less the cost of necessary repairs of $17,675.00, the Commissioner found that the fair and reasonable value of the *International* on October 6, 1943, was $434,445.99 (R. 11). The Court below refused to accept this value and chose to rely upon the intentionally depressed market of April 1942 reflected by the sale of only one comparable vessel.

2. Rule 3 of the Advisory Board on Just Compensation, *supra*, provides that acquisition cost is another factor which may be used as a guidepost in finding the fair and reasonable value of a vessel when there is no actual market at the time of taking. In the instant case, the Court below completely disregarded its own special findings that petitioner purchased the *International* on April 24, 1941 for use in its own business at a cost of approximately $303,112, or $69.36 per deadweight ton, and that following delivery of the vessel to petitioner in September 1941, petitioner reconverted the ship from a floating cannery to a dry-cargo vessel at a cost of approximately $64,000 and fully reconditioned it at an additional cost of $60,000 (R. 15). The total cost of the vessel to petitioner, including reconversion and reconditioning, was $427,112, equivalent to $97.74 per deadweight ton.

The evidence is undisputed that petitioner's purchase of the vessel and subsequent reconversion to a dry-cargo vessel a few months prior to its requisition for use was a *bona fide* transaction, and that petitioner obtained the vessel at the lowest price possible in the market at that time.

The decline in the market value of comparable ships between the time of purchase and the time of taking was due solely to the deliberate action of the Government which

sought to reduce prices for its own benefit. The disregard of acquisition cost by the Court below in arriving at the just compensation to which petitioner is entitled is in direct conflict with Rule 3 of the Advisory Board on Just Compensation.

3. Another factor which should have been considered by the Court below in determining the value of petitioner's vessel at the time of taking was the value placed on the vessel for insurance purposes. The Court and the Commissioner both found that prior to and at the time the *International* was requisitioned for use on June 6, 1942, it was insured for $425,000 (R. 9, 16). They further found that after the vessel was requisitioned for use, the War Shipping Administration insured it for $298,200, which amount was not considered adequate by petitioner who had additional insurance of $125,000 placed on the ship at its own expense, making the aggregate insurance $423,200 for the period from June 6, 1942, to the date of taking, October 6, 1943.

In determining the value of the *International,* the Court below failed to give any consideration whatever to the matter of insurance. It entirely overlooked the fact that if the vessel had been sunk by enemy action on October 5, 1943, petitioner would have collected $423,200, as well as the fact that the Government itself placed a value on the vessel for insurance purposes of $298,200 which was $23,653 *more* than the Court below allowed as just compensation.

While appraisals for insurance are factors to be considered under Rule 3 of the Advisory Board, *supra,* as well as under numerous court decisions, it is recognized that the amount of insurance has no fixed or uniform relation to the value of the property it covers and, hence, does not directly tend to disclose its value. This is because the theory and practice of insurers and insured is to make the limit of insurance much less than the value of the prop-

erty, while owners are permitted to procure insurance in amounts far below this limit. *Wilson Line, Inc.* v. *United States, supra,* 111 C. Cls. at 784; *Union Pacific R. Co.* v. *Lucas,* 136 Fed. 374, 377 (C. A. 8, 1905); *Adelphia Hotel Co.* v. *Providence Stock Co.,* 277 Fed. 905, 908 (C. A. 3, 1922). However, the courts have held that the fair value of a ship *cannot be any less* than the amount placed on the vessel for insurance purposes. Thus, in determining the just compensation to which the owner was entitled for the requisition of its car ferry *Maitland No. 1,* the Court of Claims, in *Toronto, Hamilton & Buffalo Navigation Co.* v. *United States* (On Remand), 116 C. Cls. 184, 201 (1950), said:

> "Since the *Maitland No. 1* was valued for insurance purposes at $100,000, and since there is nothing in the record to indicate anything fictional or fraudulent concerning this amount, we feel justified in proceeding upon the theory that a fair value to represent just compensation *could not be any less than that amount.*" (Emphasis supplied.)

4. In fixing the value of the *International* as of October 6, 1943, the Court below also failed to give any consideration whatever to the testimony in the record of expert witnesses who were well informed on ship values as of that time. One witness for petitioner testified that in his opinion the fair market value of the *International* on October 6, 1943 was $535,000. Another witness for petitioner stated that, based on his knowledge of the market and his experience with respect to the purchase and sale of vessels, the fair market value of the *International* on October 6, 1943 was $125 per deadweight ton, or $546,250. One of the Government's own witnesses, who had valued the International on December 7, 1941 at $80.00 per deadweight ton, or $349,600, testified that the fair and reasonable value of the vessel as of October 6, 1943 was $305,900 computed

at $70 per deadweight ton. The lowest of the values, that of $305,900 placed by the Government's witness, was $31,343 *more* than the value placed on the vessel by the Court below. Although the Court below was not bound by the testimony of the experts, their testimony was for the Court's guidance and should have been weighed and considered by it the same as other relevant evidence.

In summary, the Court below, in determining just compensation for the taking of the International *on October 6, 1943, did not follow or apply the other guideposts for valuation which were before it and which must be used in the absence of a market value established by a sufficient number of sales of comparable property in a free market at or about the time of taking.*

Conclusion

The instant case presents squarely to this Court for the first time the question of whether prices which have been deliberately depressed by the Government for the express purpose of requisitioning private property at the intentionally reduced price may be used as the measure of just compensation to which the owner is entitled, when his property is later requisitioned.

If a Government agency, in administering a statute enacted during a period of national emergency, is permitted to deliberately roll back the price and value of private property as a preliminary to requisitioning that property at the reduced price, and if the courts are permitted to sanction such action by using the deliberately depressed market value as the measure of just compensation, then the guarantees of the Fifth Amendment will be destroyed and the security of private property in this country will be irreparably impaired.

The method of valuation used by the Court below is unconstitutional, and it is in direct conflict with decisions of this Court and of other federal courts which hold that other guideposts must be used for determining valuation in the absence of a free market at or about the time of taking.

In view of the facts set forth herein, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX "A"

Applicable Sections of the Merchant Marine Act of 1936.

Sections 902(a) and (d) of the *Merchant Marine Act of 1936*, as amended, 53 Stat. 1255, 46 U. S. C. § 1242(a) and (d).

Section 902 (Section 1242). Requisition or purchase of vessels in time of emergency—Compensation; restoration; consequential damages

(a) Whenever the President shall proclaim that the security of the national defense makes it advisable or during any national emergency declared by proclamation of the President, it shall be lawful for the Commission to requisition or purchase any vessel or other watercraft owned by citizens of the United States, or under construction within the Unted States, or for any period during such emergency, to requisition or charter the use of any such property. The termination of any emergency so declared shall be announced by a further proclamation by the President. When any such property or the use thereof is so requisitioned, the owner thereof shall be paid just compensation for the property taken or for the use of such property, but in no case shall the value of the property taken or used be deemed enhanced by the causes necessitating the taking or use. If any property is taken and used under authority of this section, but the ownership thereof is not required by the United States, such property shall be restored to the owner in a condition at least as good as when taken, less ordinary wear and tear, or the owner shall be paid an amount for reconditioning sufficient to place the property in such condition. The owner shall not be paid for any consequential damages arising from a taking or use of property under authority of this section.

(d) In all cases, the just compensation authorized by this section shall be determined and paid by the Commission as soon as practicable, but if the amount of just compensation determined by the Commission is unsatisfactory to the person entitled thereto, such person shall be paid 75 per centum of the amount so determined and shall be entitled

to sue the United States to recover such further sum as, added to said 75 per centum, will make up such amount as will be just compensation therefor, in the manner provided for by sections 41(20) and 250 of Title 28. * * *

Applicable Sections of the Ship Warrants Act of 1945.

The *Ship Warrants Act* of July 14, 1941, c. 297, 55 Stat. 591, 50 War Appendix U. S. C. § 1281, *et seq.*

Section 1281. Priorities in transportation by merchant vessels during National Emergency; issuance of warrants.

During the emergency declared by the President on May 27, 1941, * * * the President may, notwithstanding any other provisions of law, whenever he deems it in the interest of national defense, including the maintenance of essential supplies and services, authorize the United States Maritime Commission to issue warrants as hereinafter provided with respect to any vessel documented under the laws of the United States or any vessel not so documented but owned by a citizen of the United States. * * * All warrants shall be issued and may be revoked pursuant to regulations issued by the United States Maritime Commission with the approval of the President.

Section 1282. Form and content of warrants; supervision of vessel by owner or charterer; effect on coastwise laws.

The warrants to be issued pursuant to this Act shall be in such form as the Maritime Commission shall prescribe, and shall set forth the conditions to be complied with by the affected vessel as a condition to receiving the priorities and other advantages provided in this Act, by reference to an undertaking of the owner or charterer with respect to the trades in which such vessel shall be employed, the voyages which it shall undertake, the class or classes of cargo or passengers to be carried, the fair and reasonable maximum rate of charter-hire or equivalent, and such incidental and supplementary matters as appear to the United States Maritime Commission to be necessary or expedient for the purposes of the warrant. * * *

Section 1283. Vessels holding warrants as entitled to priorities for loading, discharging, etc.

Vessels holding warrants issued pursuant to this Act shall be entitled to priority over merchant vessels not holding such warrants, with respect to the use of facilities for loading, discharging, lighterage or storage of cargoes, the procurement of bunker fuel or coal, and the towing, overhauling, drydocking or repair of such vessels. * * *

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In the Supreme Court of the United States

OCTOBER TERM, 1954

No. 56

SMITH-DOUGLASS COMPANY, INC., PETITIONER

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The former opinion of the Court of Claims (R. 18) is reported at 81 F. Supp. 215. The opinion of the Court of Claims on remand (R. 47) is reported at 116 F. Supp. 570.

JURISDICTION

The judgment of the Court of Claims was entered on December 1, 1953 (R. 53). On March 1, 1954, by order of the Chief Justice, the time for filing a petition for a writ of certiorari was extended to March

31, 1954 (R. 75); and on March 29, 1954, by order of Mr. Justice Jackson, the time was extended to April 30, 1954 (R. 76). The jurisdiction of this Court is invoked under 28 U.S.C. 1255(1).

QUESTIONS PRESENTED

1. Whether, in an action to recover just compensation for a cargo ship, the Court of Claims was required to award the highest wartime market value because, before requisition, market values were reduced from their peak by the operation of Government controls over shipping rates.

2. Whether the court erred in looking to sales in late 1941 and early 1942 (the last free market sales before the Government began requisitioning substantially the entire merchant fleet in April 1942), as a measure of compensation for a ship requisitioned in October 1943.

STATUTES INVOLVED

The pertinent portions of the Merchant Marine Act of 1936 (49 Stat. 1985, as amended, 46 U.S.C. 1242 *et seq.*), and of the Ship Warrants Act of 1941 (Act of July 14, 1941, c. 297, 55 Stat. 591) are set forth in the Appendix, *infra,* pp. 18-25.

STATEMENT

The petitioner brought this action under Section 902 of the Merchant Marine Act, *infra,* pp. 18-21, to recover just compensation for the requisitioning of its ship the S. S. *International.* The *International* was an ocean-going dry-cargo carrier, built in 1919 for the account of the United States Emergency

Fleet Corporation (F. 2, 3, R. 12).[1] She was one of a group of twenty-four ships built on the Great Lakes, to a set of specifications designed to enable their removal through the system of canals from the Great Lakes to the Atlantic (F. 3, R. 12-13). For this purpose, these ships were built slightly shorter and of deeper draft than comparable vessels built at ocean ports; the *International* was 253.4 feet in length, 43.7 feet in breadth, 26.2 feet in depth, and had a capacity of 4370 deadweight tons (*ibid.*). Her cost was $856,000 (*ibid.*).

After her completion, the *International* was used for a brief period, and was then consigned to the laid-up fleet until 1928, at which time she was sold to a fish packing company and was converted by that company to a floating cannery (F. 4, R. 13). As such she was used only during the Alaskan fishing season, from June to September each year, and was laid up in fresh water during the rest of the year; as a result, she was in good condition when the petitioner acquired her in April 1941 (F. 4, R. 13-14).

Petitioner bought the vessel for $250,000 plus a bare-boat charter (valued at $53,112) back to the canning company for the 1941 fishing season (F. 5, R. 14-15). After obtaining possession of the ship

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[1] The letter "F" designates a number of the Court of Claims' special findings of fact on either the first or second trial; "R" designates the record page number; "Tr." designates the page number of the transcript of testimony, filed as part of the record herein but not printed in connection with the petition or cross-petition for certiorari.

in September 1941, the petitioner spent an additional $64,000 in reconverting her to a dry-cargo carrier (F. 6, R. 15). Petitioner also spent about $60,000 on repairs and current maintenance between the time of her reconversion and October 6, 1943, when the Government requisitioned her (F. 8, R. 15). On that date, she was requisitioned by the War Shipping Administration under Section 902 of the Merchant Marine Act, *infra*, pp. 18-21 (F. 2, R. 12). The Administration's offer of $23,018.78 as just compensation was rejected by the petitioner, which, after receiving 75 per cent of this amount as part payment, brought this action for the balance of the $723,000 (plus interest) that it alleged would constitute just compensation (R. 1-5).

The Court of Claims found that at the outbreak of war in September 1939, the market value of dry-cargo carriers comparable to the *International* was about $21.00 a ton (F. 2, R. 54). Values immediately began a slight rise, at the prospect of an increase in shipping due to the war, through October 1939, when they had reached about $23.50 a ton (F. 2, 3, R. 54-56). In November, enactment of the Neutrality Act of 1939 (54 Stat. 4) resulted in barring American flag vessels from combat zones in European waters, and values fell, through December 1939, to $17.75 (F. 3, R. 55). Thereafter, shipping patterns readjusted themselves, belligerents' ships taking over United States trade to Europe and American vessels replacing belligerents' vessels elsewhere, with the result that prices rose sharply to a peak of $51.50 in April 1940 (F.

2, 10, R. 54, 59). Beginning in April 1940, the successive fall of Denmark, Norway, the low countries, and France, resulted in an oversupply of tonnage, because vessels of these nations continued to operate in competition with American vessels, while demand for shipping to these countries disappeared (Tr. 326-332). Values fell to $33.00 a ton by August 1940 (F. 2, R. 54). At this time (August 1940), with ship values at this relatively low rate, the effect of the Government's defense preparations began to be felt in the shipping market, for the first time, in the form of Government demand for commercial cargo space (Tr. 341-342). Values rose at a rapid rate through June 1941, when they reached $88.50 a ton, the highest level of the war (F. 2, R. 54).

In July 1941, the so-called Ship Warrants Act, *infra,* pp. 21-25, was passed. This Act permitted the Maritime Commission to fix private charter rates, by the device of issuing warrants that were required as a condition to obtaining priorities in the use of port facilities—loading, towage, dock space, fuel, repair services, and the like. The rates thus imposed were lower than the prevailing rates, with the result that ship values fell to $60.00 a ton by April 1942 (F. 2, R. 54). It was then that the Government began requisitioning the use of the entire merchant marine fleet, so that there was no free market after April 1942 (*ibid.*).

In the absence of free market sales at the time of the requisition, the court below rejected petitioner's theory that just compensation should be

based upon replacement cost depreciated, which, with petitioner's figures of $1,171,000 replacement cost and three per cent depreciation on diminishing balances, gave a value of $586,592.05, and, with the Government's figure of five per cent on a lower cost, gave a value of $265,000. The court held that the replacement cost method was unreliable in the face of the probable oversupply of shipping after the war. The court decided, instead, that the most dependable measure of just compensation was the market value in late 1941 and early 1942, when the last private sales of comparable vessels were made (R. 22). It found that there had been five such sales, at an average price of $250,000 (F. 10, R. 16). Concluding that the *International* was worth somewhat more than the average ship of her type, because of her limited use, her good condition, and her large complement of spare parts, the court ruled that her value in October 1943 was $290,000 (R. 23). With adjustments for necessary repairs, this amount was equivalent to $66.87 a ton (F. 1, R. 54); and after deducting the amount previously paid on account, this amount was awarded as just compensation (R. 23).

After this judgment was entered, this Court handed down its decision in *United States* v. *Cors*, 337 U. S. 325 (decided June 13, 1949), analyzing and explaining for the first time the effect of the so-called "enhancement clause" of Section 902(a) of the Merchant Marine Act, *infra*, p. 18, upon the applicable principles of valuation. The Government moved for a new trial on the basis of the *Cors*

decision (R. 23),[2] and the petitioner also moved for a new trial (R. 24). The Court of Claims then vacated its judgment and remanded the case to its commissioner for further evidence on the issues raised by the rules laid down in the *Cors* case (R. 25). Evidence was taken and findings made (R. 63-75), but the court held that the earlier valuation of $290,000 contained no element of enhancement prohibited by the statute. Accordingly, it adhered to its original valuation. (R. 47-53.)

ARGUMENT

The decision below does not call for review by this Court at petitioner's instance. The main abstract question raised by the petition—whether just compensation may be based on market values deliberately depressed by the Government for the purpose of requisition—is based on assumptions irrelevant to this case, and therefore need not and should not be reached here. The fact is that the petitioner received more than just compensation, and the grounds on which the court below rejected a still higher value conform fully with settled standards of valuation.[3]

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[2] The issues revolving around the "enhancement clause" are considered in our conditional cross-petition for a writ of certiorari in this case (*United States* v. *Smith-Douglass Company, Inc.*, No. 60, October Term, 1954).

[3] The limited number of cases in which the questions of just compensation for vessels can now arise was an important factor in the Government's decision to make its cross-petition in this case (No. 60, October Term, 1954) conditional upon the granting of the instant petition. New cases involving takings during World War II are precluded by the Court of Claims' six-year statute of limitations (28 U.S.C. 2501); the

1. The petition first urges (Pet. 9-15) that the court below erroneously measured just compensation by market values which had been deliberately depressed, for the purpose of requisition, through the operation of the Ship Warrants Act. This contention disregards the nature of the enhanced valuation petitioner claims and is also based upon unfounded assumptions as to the purpose and effect of the Government's action under the Ship Warrants Act.

a. Under the authority of the Ship Warrants Act, the Maritime Commission, beginning in July 1941, was able to bring about some reduction in shipping rates by requiring ship operators to agree to maximum rates as a condition of receiving warrants without which they could not obtain priorities in port facilities. This situation resulted in a drop in the anticipated earnings of merchant ships, and the market value of dry cargo ships accordingly fell off from its peak in July 1941. At that time values had mounted to $88.50 a ton for ships comparable to petitioner's, and the drop effected was from this inflated figure to the $66.87 a ton received by petitioner. The latter figure, however, was more than three times the peacetime value of $21.00 a ton. Petitioner's argument amounts, in

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emergency power to requisition was ended on July 25, 1947. 61 Stat. 451, 454. The President's Proclamation of December 16, 1950 (Proclamation No. 2914, 15 F. R. 9029) "proclaiming the existence of a national emergency" revived the power to requisition under Section 902 of the Merchant Marine Act, *infra*, pp. 18-21, but there have been no requisitions under that authorization.

short, to the bald contention that the Fifth Amendment requires that the petitioner receive the peak wartime value of its ship. But the Constitution requires only that a claimant receive no more than fair market value, with stress on fairness to the public as well as to the property owner (see, *e.g.*, *Bauman* v. *Ross*, 167 U. S. 548, 574; *United States* v. *Commodities Trading Corp.*, 339 U. S. 121, 123-4; *United States* v. *Miller*, 317 U. S. 369, 373-377); and no market value is just that is based upon earnings inflated by the Government's massive wartime need for shipping.

This view is based not only upon general principles of eminent domain valuation but also upon Congress' adoption of this standard in the so-called "enhancement clause" of the Merchant Marine Act, *infra*, p. 18. Section 902 of the Act, upon which this action is based, provides that "in no case shall the value of the property taken be deemed enhanced by the causes necessitating the taking or use" (*infra*, p. 19). The causes for the rise of ship values from $21 to $89 a ton, as we show in detail in our conditional cross-petition for a writ of certiorari (No. 60, October Term, 1954), included large-scale Government intervention in the shipping market for the purpose, among others, of acquiring cargo space for military cargo, for lend-lease cargo, for strategic materials for Government stockpiles and for civilian supplies essential for war and defense contracts. See *United States* v. *Cors*, 337 U. S. 325.

In our view, as set forth in the cross-petition, a

major portion of the amount actually awarded to the petitioner (*i.e.*, $66.87 per ton) constituted enhancement prohibited by the statute. The court below did not go this far, but it did recognize that the figure of $88.50 per ton, which petitioner insists is the least that must be awarded to it, contained some prohibited enhancement. See R. 53. Further, the court was evidently of the view that the amount of forbidden enhancement in World War II ship values at their highest level approximately balanced the amount by which the effects of the Ship Warrants Act depressed values below the 1941 peak. Indeed, the court itself thought that "It is * * * possible that, in spite of that fall, the depressed prices may still have contained some small element of enhancement" (R. 53). Petitioner has not sustained its burden of showing that this is not true (see pages 18-20 of our cross-petition for a writ of certiorari, No. 60, October Term, 1954), and it follows that the court was clearly prohibited by the statute from awarding more than the same value as that achieved by the operation of the Ship Warrants Act—regardless of the propriety of directly taking account of the fall in value attributable to that Act.

b. Moreover, consideration of the operation of the Ship Warrants Act also compels the conclusion that its effect on the market value of ships did not make that value unfair or unreasonable. The Act did not, as petitioner's argument implies, fix the selling price of ships. It merely enabled the Maritime Commission to set certain maximum rates

during the wartime emergency, and this rate fixing had at most an indirect effect on values through its effect upon the short-run earnings prospects of ship operators. In addition, the statutory standard by which rates were to be fixed was "fair and reasonable maximum rate[s]" *infra*, p. 22.[4] Fixing rates at a fair and reasonable level could not have affected ship values otherwise than fairly and reasonably, and fair and reasonable values are the ultimate constitutional standard of just compensation. Cf. *United States* v. *Commodities Trading Corp.*, 339 U. S. 121, and see *supra*, p. 9.

The fairness and reasonableness of the rates to the industry as a whole were insured not only by the statutory standard but by the fact that they were imposed "by means of a commercial bargain" (H. Rept. No. 526, 77th Cong., 1st Sess., p. 4). The rates were not fixed by regulations having the force of law, as in the case of price or rent controls. The only sanction for enforcement was the withholding of priorities for certain port services; any ship

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[4] The standard of "fair and reasonable" rates is wholly adequate, in the surrounding wartime circumstances, as a standard for the exercise by the Maritime Commission of delegated powers, and consequently petitioner's contention (Pet. 14) that the Ship Warrants Act was an unconstitutionally vague delegation of legislative powers is wholly unfounded, even if the validity of that Act could be questioned in this proceeding. Cf. *Lichter* v. *United States*, 334 U. S. 742, 778-786; *Yakus* v. *United States*, 321 U. S. 414; *Bowles* v. *Willingham*, 321 U. S. 503; *FPC* v. *Hope National Gas Co.*, 320 U. S. 591, 600-601; *National Broadcasting Co.* v. *United States*, 319 U. S. 190, 225-226; *Sunshine Coal Co.* v. *Adkins*, 310 U. S. 381, 397-398; *FTC* v. *Keppel & Bro.*, 291 U. S. 304, 311-312, 314; *Levy Leasing Co.* v. *Siegel*, 258 U. S. 242, 243, 248-250.

operator was free to reject the rates offered by the Maritime Commission. This system could hardly have operated unless the shipping industry as a whole found the rates profitable, for if a substantial number of shipowners had rejected the proffered rates priorities would automatically have been rendered valueless. Thus, it is clear that the administrative rates allowed reasonable earnings to the industry as a whole, and petitioner has not suggested that special circumstances made this untrue as to it. Just compensation requires no more than a market value based on an earnings rate agreed upon by the industry. Cf. *Vogelstein & Co.* v. *United States,* 262 U. S. 337.[5]

c. Finally, petitioner's entire argument is predicated on the unfounded assumption that the rates fixed under the Ship Warrants Act were deliberately set for the purpose of lowering the cost of the contemplated requisition of the merchant fleet. This claim is not borne out by history or by this record. Congress enacted the statute for two specific purposes: (1) "To facilitate to the maximum degree the use or employment of available vessel supply, also the use or employment of shore equipment

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[5] The voluntary nature of the warrants system makes untenable the contention (Pet. 14) that the absence of provision for hearings in fixing rates under the Ship Warrants Act denied shipowners due process. Petitioner has no standing to raise such a question in this proceeding, in which it is not shown that it ever sought a warrant; but if it had, it clearly had no right to object to rates which were fixed by means of a "commercial bargain." Cf. *Perkins* v. *Lukens Steel Co.*, 310 U. S. 113.

and services * * * so as to insure that national-defense requirements are fulfilled," and (2) "[t]o accomplish these results in a manner that will protect the interests of the public by eliminating the possibility of excessive transportation charges for the carriage of commodities for the national-defense program or for consumption by the public" (H. Rept. No. 526, 77th Cong., 1st Sess., p. 3; see also S. Rept. No. 44, 77th Cong., 1st Sess., pp. 2-3). In short, the rate fixing provisions were inserted for the purpose of protecting both the Government and private consumers against wartime inflation in transportation costs. There is nothing to support the allegation that the Maritime Commission acted for any different purpose. The War Shipping Administration did refrain from requisitioning, on a large scale, until ship values had fallen as a result of the ceilings on rates, but this effect was merely incidental to actions having far broader, and wholly legitimate purposes.[6] Cf. *United States* v. *Commodities Trading Corp.*, 339 U. S. 121.

2. Petitioner also contends (Pet. 15-24) that the number of sales of comparable ships was too small and that such sales were too remote in time to constitute a "market" and that the court should have relied exclusively on other methods of valuation. There are several answers to this argument.

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[6] All that Admiral Land said, in the statements quoted and referred to at Pet. 10-11, is that the Maritime Commission and the War Shipping Administration did not requisition while ship prices were at peak level; he did not say that rates were set under the Ship Warrants Act for the very purpose of being able to requisition at lower prices.

a. First, the court considered the five most recent sales of comparable ships as relevant evidence, but it did not, as petitioner contends, flatly accept these as the sole measure of just compensation. The average price of the five sales was $250,000, or a little more than $57.00 a ton; the court, however, made adjustments for particular factors making the *International* more valuable, bringing the amount awarded to $66.87 a ton. The court did not rigidly rely on past sales. And it is clear that the court was justified in looking to such sales as evidence, to the extent that it did. "[The absence of enough sales to constitute a market] does not put out of hand the bearing which the scattered sales may have on what an ordinary purchaser would have paid for the clamant's property. We simply must be wary that we give these sparse sales less weight than we accord 'market' price, and take into consideration those special circumstances in other sales which would have affected our hypothetical buyer." *United States* v. *Toronto, H. & B. Nav. Co.*, 338 U. S. 396, 402.

b. Moreover, we think that in this case the sales of five comparable ships may well have been sufficient to constitute a "market." During the war, dry cargo vessels, ton for ton, were almost wholly fungible; and five sales of a commodity so nearly fungible may well have been enough to establish what willing buyers were paying willing sellers.[7]

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[7] The suggestion (Pet. 15, 16) that the court below relied on the sale of a single ship, in April 1942, is contrary to the record, which shows that the court started from the average price of five sales. See, *e.g.*, R. 22.

To the suggestion that the previous sales were too remote in time to constitute evidence of value in October 1953, the Court of Claims gave a sufficient answer by pointing out that the value by October 1943 was probably less than that in 1941 or 1942, by reason of the fact that it must have been increasingly clear to prospective buyers that the end of the war was approaching and that there would be a vast oversupply of shipping (R. 22).

c. The court was wholly justified in rejecting the alternative bases of valuation urged by petitioner—primarily, reproduction cost less depreciation. This standard was rightly regarded as an unreliable indicator of value in the circumstances of this case. As the court pointed out (R. 21-22), reliance upon depreciated reproduction cost assumes that the value of a vessel declines with age in a smooth curve, but experience is to the contrary. After both World Wars the vast oversupply of tonnage made shipping, old and new alike, relatively valueless, while during the war tonnage was so much in demand that old and new vessels were almost equally valuable. Reproduction costs were also vastly inflated during the war. In view of these factors, it seems correct to say that there was little connection between depreciated reproduction cost and what a prospective buyer would have been willing to pay.

Petitioner also argues that the court below should have looked to petitioner's cost of acquiring the *International* as a "guidepost" (Pet. 20). But the result obtained by relying on acquisition cost appears to be identical with that reached by the court.

Petitioner bought the vessel in April 1941, obtained delivery of her in September 1941, and converted her to a cargo carrier in November 1941. The purchase price plus reconversion cost totaled $367,112, or about $84.00 a ton, which corresponds rather closely with market values prevailing at that time. Because of this close correspondence, the court would have been justified in reasoning that when the market dropped in the latter half of 1941, the value of the *International* would also have fallen. Petitioner urges that the $60,000 spent on repairs, maintenance and reconditioning should be regarded as part of the acquisition cost. These may well have been properly regarded as current expenses; but, assuming the contrary, the court made due allowance for them by awarding, some two years later, $40,000 more than the market value of comparable ships to compensate for these items. See R. 23.

It is also argued that the *International*'s valuation for insurance purposes should have been considered more decisive. While we recognize that this is a factor that the court may consider, giving it more or less weight as the circumstances indicate, there is nothing to compel reliance on this factor to the exclusion of other and conflicting evidence.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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JUNE 1954.

APPENDIX

1. The pertinent provisions of the Merchant Marine Act, 1936, 49 Stat. 1985, as amended, 46 U. S. C. 1242, are as follows:

> SEC. 902. (a) Whenever the President shall proclaim that the security of the national defense makes it advisable or during any national emergency declared by proclamation of the President, it shall be lawful for the Commission to requisition or purchase any vessel or other watercraft owned by citizens of the United States, or under construction within the United States, or for any period during such emergency, to requisition or charter the use of any such property. The termination of any emergency so declared shall be announced by a further proclamation by the President. When any such property or the use thereof is so requisitioned, the owner thereof shall be paid just compensation for the property taken or for the use of such property, but in no case shall the value of the property taken or used be deemed enhanced by the causes necessitating the taking or use. If any property is taken and used under authority of this section, but the ownership thereof is not required by the United States, such property shall be restored to the owner in a condition at least as good as when taken, less ordinary wear and tear, or the owner shall be paid an amount for reconditioning sufficient to place the property in such

condition. The owner shall not be paid for any consequential damages arising from a taking or use of property under authority of this section.

(b) When any vessel is taken or used under authority of this section, upon which vessel a construction-differential subsidy has been allowed and paid, the value of the vessel at the time of its taking shall be determined as provided in section 802 of this Act, and in determining the value of any vessel taken or used, on which a construction-differential subsidy has not been paid, the value of any national defense features previously paid for by the United States shall be excluded.

(c) If any property is taken and used under authority of this section, but the ownership thereof is not required by the United States, the Commission, at the time of the taking or as soon thereafter as the exigencies of the situation may permit, shall transmit to the person entitled to the possession of such property a charter setting forth the terms which, in the Commission's judgment, should govern the relations between the United States and such person and a statement of the rate of hire which, in the Commission's judgment, will be just compensation for the use of such property and for the services required under the terms of such charter. If such person does not execute and deliver such charter and accept such

rate of hire, the Commission shall pay to such person on account of just compensation a sum equal to 75 per centum of such rate of hire as the same may from time to time be due under the terms of the charter so tendered, and such person shall be entitled to sue the United States to recover such further sum as added to such 75 per centum will make up such amount as will be just compensation for the use of the property and for the services required in connection with such use. In the event of loss or damages to such property, due to operation of a risk assumed by the United States under the terms of a charter prescribed in this subsection, but no valuation of such vessel or other property or mode of compensation has been agreed to, the United States shall pay just compensation for such loss or damage, to the extent the person entitled thereto is not reimbursed therefor through policies of insurance against such loss or damage.

(d) In all cases, the just compensation authorized by this section shall be determined and paid by the Commission as soon as practicable, but if the amount of just compensation determined by the Commission is unsatisfactory to the person entitled thereto, such person shall be paid 75 per centum of the amount so determined and shall be entitled to sue the United States to recover such further sum as, added to said 75 per centum, will make up such amount as will be just compensation therefor,

in the manner provided for by section 24, paragraph 20, and section 145 of the Judicial Code (U. S. C., 1934 edition, title 28, secs. 41, 250).

* * * * *

(e) The Commission is authorized to repair, recondition, reconstruct, and operate, or charter for operation, any property acquired under authority of this section. The Commission is further authorized to transfer the possession or control of any such property to any department or agency of the Government of the United States upon such terms and conditions as may be approved by the President. In case of any such transfer the department or agency to which the transfer is made shall promptly reimburse the Commission for its expenditures on account of just compensation, purchase price, repairs, reconditioning, reconstruction or charter hire for the property transferred. Such reimbursements shall be deposited in the construction fund established by section 206 of this Act.

2. The Ship Warrants Act (Act of July 14, 1941, c. 297, 55 Stat. 591) reads as follows:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That during the emergency declared by the President on May 27, 1941, to exist but not after June 30, 1943, the President may, notwithstanding any other

provisions of law, whenever he deems it in the interest of national defense, including the maintenance of essential supplies and services, authorize the United States Maritime Commission to issue warrants as hereinafter provided with respect to any vessel documented under the laws of the United States or any vessel not so documented but owned by a citizen of the United States. Such warrants may also be issued to foreign-flag vessels not owned by citizens of the United States upon application therefor by the owner of said vessel or the charterer thereof on behalf of such owner. Such application shall be in such form as the United States Maritime Commission may prescribe. All warrants shall be issued and may be revoked pursuant to regulations issued by the United States Maritime Commission with the approval of the President.

SEC. 2. The warrants to be issued pursuant to this Act shall be in such form as the Maritime Commission shall prescribe, and shall set forth the conditions to be complied with by the affected vessel as a condition to receiving the priorities and other advantages provided in this Act, by reference to an undertaking of the owner or charterer with respect to the trades in which such vessel shall be employed, the voyages which it shall undertake, the class or classes of cargo or passengers to be carried, the fair and reasonable maximum rate of charter-hire or equivalent, and such incidental and

supplementary matters as appear to the United States Maritime Commission to be necessary or expedient for the purposes of the warrant. Nothing in this Act shall authorize the United States Maritime Commission to require the owner or charterer to relinquinsh the manning, storing, victualing, supplying, fueling, maintaining, or repairing of his vessel to any other person or persons. Nothing in this Act shall be deemed to alter, amend, or repeal any of the coastwise laws of the United States.

SEC. 3. Vessels holding warrants issued pursuant to this Act shall be entitled to priority over merchant vessels not holding such warrants, with respect to the use of facilities for loading, discharging, lighterage or storage of cargoes, the procurement of bunker fuel or coal, and the towing, overhauling, drydocking or repair of such vessels. Vessels holding warrants shall have such priority as among themselves, as the United States Maritime Commission shall determine to be necessary and advisable in the interests of national defense, or as may be specified in the warrants. Persons in the United States, including the Philippine Islands and the Canal Zone, furnishing any of the above-mentioned facilities shall be authorized, and under rules and regulations prescribed by the United States Maritime Commission with the approval of the President may be required, to grant such priorities, anything

in any contract whether heretofore or hereafter made to the contrary notwithstanding.

SEC. 4. In the administration of this Act it shall be the policy of the Commission to make fair and reasonable provision for priorities with respect to (1) the importation of substantial quantities of strategic and critical materials, (2) the transportation of substantial quantities of materials when such transportation is requested by any defense agency, and (3) the transportation in the foreign or domestic commerce of the United States of substantial quantities of materials deemed by the Commission to be essential to the defense of the United States: *Provided,* That there shall be no unjust discrimination between ports of the United States. Nothing in this Act shall authorize the exaction of any sum from the holder of a warrant solely for the privilege of carrying cargo on any route. Vessels that on January 1, 1941, were engaged primarily in the coastwise transportation of coal for national defense and domestic consumption shall be granted warrants only so long as they continue in the same service as of said date, except that in case any such vessel ceased, before June 15, 1941, to engage in such transportation of coal and before such date became principally engaged in the transportation of defense materials, the Commission may grant such vessel a warrant for such service as it deems suitable pursuant to section 2.

SEC. 5. The term "citizen of the United States" as used in this Act includes corporations, partnerships, and associations, existing, authorized, or organized under the laws of the United States or any State, district, Territory, or possession thereof.

SEC. 6. Whoever willfully violates any rule, regulation, or order issued under the authority conferred herein shall be punished by a fine of not more than $5,000, or by imprisonment for not more than two years or both: *Provided,* That the District Court of the Canal Zone and the several courts of first instance of the Commonwealth of the Philippine Islands shall have jurisdiction over offenses committed against the provisions of this Act within the Canal Zone and the Philippine Islands, respectively.

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In the Supreme Court of the United States

OCTOBER TERM, 1953

No. 738

UNITED STATES OF AMERICA, PETITIONER

v.

SMITH-DOUGLASS COMPANY, INC.

CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

On April 28, 1954, the respondent herein, Smith-Douglass Company, Inc., filed a petition for a writ of certiorari (No. 732) in the above case seeking review of the judgment of the United States Court of Claims awarding $292,232.18 as just compensation for the taking of respondent's ship the S. S. *International*. The Government will file a brief in opposition to the granting of this petition.

The Solicitor General, on behalf of the United States, prays, however, that if this Court grants the petition for a writ of certiorari in No. 732, a cross-writ of certiorari be issued to review the judgment of the Court of Claims on the grounds indicated below.[1]

[1] The record in No. 732 includes the record on which this cross-petition is based.

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OPINIONS BELOW

The former opinion of the Court of Claims (R. 18) is reported at 81 F. Supp. 215. The opinion of the Court of Claims on remand (R. 47), here in question, is reported at 116 F. Supp. 570.

JURISDICTION

The judgment of the Court of Claims was entered on December 1, 1953 (R. 53). On February 26, 1954, by order of Mr. Chief Justice Warren, the time for filing a petition for a writ of certiorari was extended to March 31, 1954 (R. 76); and on March 31, 1954, by order of the Chief Justice the time for filing a petition for a writ was extended to April 30, 1954 (R. 77). The jurisdiction of this Court is invoked under 28 U. S. C. 1255.

QUESTIONS PRESENTED

1. Whether, in an action to recover just compensation for a cargo ship requisitioned during World War II, the court below erroneously made an award which, in violation of Section 902 (a) of the Merchant Marine Act of 1936, included enhancement due to the causes which necessitated the taking.

2. Whether the court below erred in holding that the burden of proving the amount of prohibited enhancement rests upon the United States rather than upon the plaintiff.

STATUTE INVOLVED

The immediately pertinent portion of the Mer-

chant Marine Act of 1936, 49 Stat. 1985, 2015, as amended, 46 U. S. C. 1242 (a), reads as follows:

> Sec. 902. (a) Whenever the President shall proclaim that the security of the national defense makes it advisable or during any national emergency declared by proclamation of the President, it shall be lawful for the Commission to requisition or purchase any vessel or other watercraft owned by citizens of the United States, or under construction within the United States, or for any period during such emergency, to requisition or charter the use of any such property. The termination of any emergency so declared shall be announced by a further proclamation by the President. When any such property or the use thereof is so requisitioned, the owner thereof shall be paid just compensation for the property taken or for the use of such property, *but in no case shall the value of the property taken or used be deemed enhanced by the causes necessitating the taking or use.* [Emphasis added.]

A fuller quotation from Section 902 is set forth in the Appendix, *infra*, pp. 23–26.

STATEMENT

A statement of the case relating to the taking of the vessel and its valuation is set forth in the Government's brief in opposition in No. 732, to which the Court is respectfully referred. The facts pertinent to the issues raised by this cross-petition, as they appear from the findings of the court below and from the evidence, are as follows:

After the court below entered its former judgment, evaluating the *International* as of the date of her requisition, October 6, 1943, at $290,000, or $66.87 a deadweight ton for the 4370 ton ship (F. 1, R. 53–54),[2] this Court handed down its decision in *United States* v. *Cors*, 337 U. S. 325. The *Cors* decision analyzed and explained for the first time the effect of the so-called "enhancement clause" of Section 902 (a) of the Merchant Marine Act (italicized above at p. 3) upon the applicable principles of valuation. The court below thereupon vacated its judgment and remanded the case to a commissioner for the taking of evidence to determine how much of the amount by which the 1943 price of $66.87 a ton exceeded the September 1939 price of $18.00 a ton (F. 1, R. 54) represented enhancement due to the causes which necessitated the taking and should, under the statute as explained in *Cors*, be excluded from the award (R. 25). The hearing produced facts which may be summarized briefly as follows:

At the outbreak of war in September 1939, the value of dry-cargo carriers comparable to the *International* was about $21.00 a ton (F. 2, R. 54). Values immediately began a slight rise, at the prospect of an increase in shipping due to the

[2] The letter "F" designates the number of the court's findings; "R" designates the record page number. "Tr." designates the page of the transcript of testimony, filed as part of the record herein but not printed in connection with the petition or cross-petition for certiorari.

war, through October 1939, when they had reached about $23.50 a ton (F. 2, 3, R. 54–56). In November, enactment of the Neutrality Act of 1939 (54 Stat. 4) resulted in barring American flag vessels from combat zones in European waters, and values fell through December 1939 to $17.75 (F. 3, R. 55). Thereafter, shipping patterns readjusted themselves, belligerents' ships taking over United States trade to Europe and American vessels replacing belligerents' vessels elsewhere, with the result that prices rose sharply to a peak of $51.50 in April 1940 (F. 2, 10, R. 54, 59). Beginning in April 1940, the successive fall of Denmark, Norway, the low countries, and France, resulted in an oversupply of tonnage, because vessels of these nations continued to operate in competition with American vessels, while demand for shipping to these countries disappeared (Tr. 326–332). Consequently, values fell to $33.00 a ton by August 1940 (F. 2, R. 54).

At this time, August 1940, with ship values at this relatively low rate, the effect of the Government's defense preparations began to be felt in the shipping market, for the first time, in the form of Government demand for commercial cargo space (Tr. 341–342). Values rose at a rapid rate from this time through June 1941, when they reached $88.50 a ton, the highest level of the war (F. 2, R. 54). In July 1941, the enactment of the Ship Warrants Act (55 Stat. 591), enabled the Maritime Commission to impose

virtual ceilings on cargo rates, with the result that ship values fell to $60.00 a ton by April 1942 (*ibid.*).* At that time the Government began requisitioning for use the entire American merchant marine, so that there was no free market after April 1942 (*ibid.*).

The Government's increased demand in the shipping market after August 1940, took four forms. The *first* was exports of military cargo (F. 16, R. 66). Early in 1941, the War Department estimated that it would need space in commercial vessels, in excess of its own transport, to export 2,166,599 tons of cargo in foreign trade during 1941 (F. 17, R. 68); and three witnesses testified that at least this amount was moved (Tr. 26, 179, 564–572). There was also evidence that the Navy's requirements for 1941 amounted to an additional 500,000 to 700,000 tons (Tr. 570–572).

The *second* element of Government demand was exports of lend-lease cargo (F. 16, R. 66). The so-called Lend-Lease Act (Act of March 11, 1941, c. 11, 55 Stat. 31) was passed on March 11, 1941; shortly thereafter, the President directed the Maritime Commission to assemble a pool of 2,000,000 tons of shipping. Pursuant to this directive a total of 637,979 ton of cargo was loaded and shipped to the Red Sea area or to Burma

* See footnote 13, *infra*, pp. 17–18.

during 1941, 123,530 tons of it before July 1941 (F. 19, R. 70–72).[4]

The *third* factor was imports of strategic materials for Government stockpiling (F. 16, R. 66). The Maritime Commission, the Reconstruction Finance Corporation, and the Rubber Reserve Corporation were active before June 1941, in attempting to secure shipping space for imports of strategic materials for the account of the Rubber Reserve Company, the Metals Reserve Company, and the Defense Supplies Corporation, all Government corporations subsidiary to RFC (F. 20, R. 74; Tr. 552–570, 573–580, 612–613, 617–21, 635–636). This program resulted in imports on commercial ships of 1,594,781 tons of cargo during 1941, about one-third of it during the first half of the year (F. 20, R. 73).[5]

The *fourth* and last factor was imports for civilian account of materials designated by the Munitions Board as strategic, critical, or essential (F. 16, R. 66). The import of such strategic materials in American flag vessels increased from 2.5 million tons in 1939 to 4.7 million tons in 1940 and to 7.3 million tons in 1941 (F. 18, R. 69). Some of this factor in the increased demand for shipping was nongovernmental in its direct impact on the market, but "to some considerable extent"

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[4] The figures refer to cargo actually landed. No account is taken of cargoes en route or of space chartered for future shipments.

[5] See footnote 4, *supra*.

importers of such materials relied on the Maritime Commission to procure shipping space in the market (F. 18, R. 70). Also, much of the need for these commodities arose from the Government's letting of defense contracts (F. 11, R. 60–61; Tr. 2241–2242).

Ship values were of course also affected somewhat by other factors than direct Government intervention. Among these was the increased demand for shipping resulting from the rise between 1939 and 1941 in the level of general economic activity in the United States (F. 11, R. 60). And there were factors on the supply side, including the net loss, world-wide, by sinkings in excess of new construction, of 2,178 dry-cargo ships totalling 5,943,150 gross tons, out of a world fleet of 30,589,084 gross tons existing at the outbreak of the war (F. 7, R. 57). Moreover, the merchant fleets of belligerent nations were to an increasing extent used for war purposes and were therefore withdrawn from the American market for shipping space (F. 10, R. 58–59). Partially offsetting these factors was the increased utilization of existing capacity: in 1939, because of the existence of excess tonnage, vessels were, on the average, loaded to not more than two-thirds of capacity; after the outbreak of war, the excess capacity was fully utilized (F. 6, 13, R. 57, 62).* Another partially offsetting factor in the

* Fuller utilization of cargo space tended, on the one hand, to increase the supply of shipping; but it also tended, on the

American market was the release by the Maritime Commission of almost the entire laid-up fleet of 109 vessels, aggregating 770,000 gross tons, and the sale or charter of the vessels comprising this fleet to foreign or domestic operators (F. 6, 15, R. 57, 64). The Maritime Commission also built some 95 ships during the period 1939–1941 (F. 15, R. 65); on the other hand, some 132 ships were transferred to the Army and Navy during the same period and were presumably withdrawn from the commercial market (*ibid.*).

On the basis of these facts, the Government contended that between 44 and 80 per cent of the increment in the *International*'s value from $18 a ton in September 1939 to $66.87 a ton at the time of her requisition (October 6, 1943) was due to Government intervention in the market for cargo space and must therefore, under the "enhancement" clause, be deducted from the value found as of the date of requisition. The court rejected this contention (R. 50–53). It concluded, as to the factor of Government exports of military cargo, that there was no means of determining how much was actually transported on merchant vessels and how much was transported on vessels owned by the Army (R. 51). Since

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other hand, to increase the earnings of ships and to make them accordingly more valuable, because use of excess capacity augmented revenues more rapidly than costs (F. 13, R. 62).

it could reach no conclusion it disregarded this factor altogether as an element of statutory enhancement. It acted similarly in respect to the factor of imports of strategic materials for civilian account, on the basis of its conclusion that no quantitative estimate could be made on how much of the shipping space for this item was procured by the Government and how much resulted from private hire (R. 51–52). As to the remaining two elements of Government demand—lend-lease exports and import for Government stockpiles—the court was of the view that these factors had some weight in causing the increase of ship values but held that the amount by which they contributed to the enhancement of the *International*'s value between 1939 and its peak in July 1941 was less than the amount by which her value fell between July 1941 and her requisition in October 1943 (R. 53). Accordingly, the court adhered to its former judgment.

REASONS FOR GRANTING THE WRIT

The Court of Claims has found that the value of the *International* increased from $18 per ton in September 1939 to $67 per ton when she was requisitioned in October 1943 (R. 54)—an increase of over 350%. But that court has twice refused to attribute any of this large and rapid enhancement during a period of total defense and war effort to "the causes necessitating the taking or use", which Section 902 of the Merchant Marine

Act directs must be excluded from valuation. In the words of Circuit Judge Clark, dissenting in the similar case of *American-Hawaiian Steamship Co.* v. *United States*, 191 F. 2d 26, 29 (C. A. 2), certiorari denied, 342 U. S. 941: "The figures themselves, against this background, belie the conclusion that all enhancement of value due to the Government's need for shipping (the cause necessitating the requisition here) has been vigorously squeezed out."[7] The restrictive approach of the Court of Claims in the present case foreshadows the principles to be applied in a number of World War II ship requisition cases now pending in that court, and will doubtless have an impact in the present or any future emergency calling for requisitions of merchant shipping.[8]

1. In *United States* v. *Cors*, 337 U. S. 325, this Court went far toward settling the question of

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[7] Judge Clark's views on the "enhancement" clause of Section 902 of the Merchant Marine Act are set forth in his dissents in the *American-Hawaiian Steamship Co.* case, *supra*, and *De La Rama S. S. Co.* v. *United States*, 206 F. 2d 651, 656 (C. A. 2). He had been a member (along with Judge Joseph C. Hutcheson, Jr. and Justice Irwin Untermeyer) of the Second Advisory Board on Just Compensation (during World War II).

[8] The emergency power to requisition ships in World War II was ended on July 25, 1947. 61 Stat. 451, 454. The President's Proclamation of December 16, 1950 (Proclamation 2914, 15 Fed. Reg. 9029) "proclaiming the existence of a national emergency" was revived the power to requisition under Section 902 (a) of the Merchant Marine Act (*infra*, p. 23), but there have been no requisitions under that authorization.

what are the "causes necessitating the taking," enhancement from which must be excluded in valuing requisitioned merchant vessels for just compensation purposes. It is clear that enhancement stemming from any of three sources is excludable. Experience suggests that the three may often be mutually interdependent in an economic sense, but they may be analytically considered one at a time. The three are these:

First, *a prospective taking of the vessel in question, reasonably probable* (337 U. S. at 334, 335). As we read the decision, this much is assimilable to the pre-*Cors* eminent domain rule of *United States* v. *Miller*, 317 U. S. 369, 374–379. The prospect of a special need by the Government leading to a probable taking gives rise to a speculative increase in the value of land or in the value of each member of a class of similar ships—in this case, dry-cargo carriers of the *International*'s type.

Second, *the previous taking of similar vessels* (337 U. S. at 334, 335). To the extent that previous requisitions of tonnage reduce the space available to meet the demand of private shippers, the value of the ships remaining in the market is enhanced. The dissenters in *Cors* questioned whether this element of enhancement was barred by the enhancement clause, the objection being that the increase from this source was due to private demand and not to the Government's need which necessitated the taking. 337 U. S. at

343. But the Court concluded that this item was excludable.[9]

Third, *the Government's intervention in the shipping market by purchase, voluntary charter, and all other means short of direct requisition* (337 U. S. at 334, 335, 336). It is this element on which the Government relies almost entirely in this case. This Court spoke of the "Government's need for vessels," which it defined as a "need for the precise ship taken, for the type or class of ship taken, or for ships which perform the same or related functions." 337 U. S. at 334. It is clear that after September 1939 this defense and war need was sought to be satisfied in ways other than the actual requisition of ships:—through charters, purchases, and the use of cargo space on private carriers. That the Court did not equate the Government's intervention in the market with use of the requisitioning power alone is clear from the opinion which carefully distinguishes the Government's need from its actual takings. 337 U. S. at 334–336. Moreover, although the first requisitions did not occur until July 1941,[10] and requisitioning did not begin on a large scale until April 1942, the

[9] We treat enhancement due to the removal of vessels from the private market by Government charter or purchase, rather than by requisition, as part of the third category of excluded enhancement.

[10] All of the requisitions in July 1941 were of laid-up foreign tonnage.

Court expressly held that enhancement occurring before May 1941 was excludable from the determination of just compensation. 337 U. S. at 334.

In short, the *Cors* case, as we read it, requires the exclusion of all enhancement in a ship's value attributable to the Government's defense and wartime need for tonnage and its consequent intervention in the shipping market, whether through compulsory requisition or through voluntary purchase, chartering, or hiring of vessel space. A sharp increase in the value of ships remaining in private hands follows close upon such broad-scale public intervention because of the prospect that the remaining vessels will be used in the Government's expanding defense and war program, combined with the fact that the supply of vessels is limited and the total demand great and increasing. The direct result is the creation of a seller's market in which normal prices are highly inflated because of the Government's special need (337 U. S. at 333–234)—inflated values which the Government need not pay as part of constitutional "just compensation."

This construction of the "enhancement" clause accords fully with the clause's long legislative history which shows that its prime purpose was to require vessels to be requisitioned at less than their war or emergency prices, such as were paid during World War I. Congress intended that requisition awards should follow the levels of

peacetime prices, of the "value prior to the emergency," of "normal value," of values before the "war comes on."[11] Such emergency, abnormal, and wartime market prices largely result from the Government's special and extraordinary demand for ships and shipping space in time of stress, and the "enhancement" clause was designed as the device to contain this inflation in values.[12]

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[11] This legislative history is set out and discussed at length in the Government's brief in *United States* v. *Cors*, No. 132, October Term, 1948, pp. 25–40, and 92–105, to which the Court is respectfully referred. The same history is referred to by Judge Clark, in his dissent in the *American-Hawaiian* case (*supra*, p. 11), as wholly "one way" in its approach.

[12] The controversial history of the "enhancement" clause since 1942 is set forth in detail in the Government's brief in the *Cors* case, October Term, 1948, No. 132, at pp. 90–113, and in shorter form in the Government's petition for a writ of certiorari in *United States* v. *American-Hawaiian Steamship Co.*, October Term, 1951, No. 487, pp. 19–23.

Two of the major viewpoints are those of the Comptroller General, on the one hand, and of the Advisory Board on Just Compensation (whose views were followed by this Court in *Cors* (337 U. S. at 334)), on the other. The Comptroller General's method has been to find the 1939 value and adjust it for the increase in the general price level; the approach of the Advisory Board was to find the value at the time of taking and deduct so much as was due to the specified prohibited causes. But it seems very likely that the method of *Cors* and the Advisory Board should give results, for ocean vessels, close to those given by the Comptroller General's method of finding 1939 value and adding to it the increase due to general improvement in economic conditions. The difference between the total increase over 1939 values and the increase due to general economic conditions would probably measure the increase due to the Government's need.

2. It is undeniable that from 1938 to 1942 there was a decided "spiraling of prices" in the ship market (337 U. S. at 333), and that the course of shipping activities and ship prices presented, at least *prima facie,* the type of situation with which Congress desired to deal through the mechanism of the "enhancement" clause. The contrary result would surely be "sufficiently surprising as to suggest suspicion of error" (Judge Clark dissenting in *De La Rama S. S. Co.* v. *United States,* 206 F. 2d 651, 656 (C. A. 2)).

For it is known to everyone, and borne out by the record and findings below (R. 66–74) (*supra,* pp. 6–8), that long before we entered World War II the Government's defense and allied-aid program was making large and increasing use of ocean shipping. At the outbreak of the war in Europe, in September 1939, the shipping market

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Footnote continued from p. 15.

Since the Government's intervention did not become really large until mid-1940, and since values at that period were relatively near 1939 levels, the difference between the Comptroller General's method and the indicated method would probably not be great.

Congress has recently announced that it favors the Comptroller General's view of prohibited enhancement. The Third Supplemental Appropriation Act, 1951, Act of June 2, 1951, 65 Stat. 52, 60, provided that no money should be paid by the Department of Commerce for requisitioned vessels unless the price "is computed in accordance with subsection 902 (a) [of the Merchant Marine] Act, as that subsection is interpreted by the General Accounting Office." See also, to similar effect, The Second Supplemental Appropriation Act, 1948 (Act of July 31, 1947), 61 Stat. 695, 697–698.

was depressed; tonnage existed in excess of demand. After the fall of France in June 1940, the American defense program, which had been begun a year earlier, increased its tempo tremendously and at an accelerating rate. The newly acquired foreign bases had to be built and supplied. Immense quantities of strategic and critical materials, including rubber, tin, manganese, and chromium, were imported for Government account or to fill Government defense contracts. In early 1941, lend-lease began, and the President called for a pool of 2,000,000 tons of existing shipping to move arms to the Allies; heavy military exports began; and imports of strategic materials became important. The upward movement in the use of the nation's merchant shipping facilities for Government purposes continued throughout 1941, and, of course, on into 1942 and 1943.

It is equally common knowledge, and the court below has specifically found (R. 54) (see *supra*, pp. 4–6), that ship values skyrocketed sharply in this defense and war era. Values, which had averaged about $20 or $21 a ton in the summer of 1939, reached $55 a ton in March 1940, fell to $33 in August 1940, and then rocketed to a peak of $89 in June 1941 (R. 54).[13] The period

[13] On July 14, 1941, the Ship Warrants Act, 55 Stat. 591, was passed. This Act permitted the Maritime Commission to fix private charter rates, by the device of issuing warrants which were required as a condition to obtaining priorities in

of this final sharp rise coincided with the period of the Government's massive intervention after August 1940. Prices rose from $33 per ton to $89 in the space of less than one year. See *supra*, p. 5. The natural and obvious expectation would be that a large part, if not all, of this steep and rapid increase must have been due directly to the Government's use of ocean shipping for American defense and for aid to our allies, *i. e.*, to the prohibited factor of the Government's defense and war need for vessels and shipping space.

3. The Court of Claims did not reach this natural and expectable conclusion because it allowed a fundamental error of law to pervade its decision. It placed on the Government, rather than on the shipowner, the burden of proving "accurately how much" of the increase in values was rooted in one or another component making up the "Government's need for shipping." See R. 51.[14] But the burden of negating prohibited enhancement should properly have been placed

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Footnote continued from p. 17.

the use of port facilities—loading, towage, docking, fuel, repair services and the like. Thereafter, the Maritime Commission was able to impose ceilings on charter rates and to force them down to these ceilings, with some consequent decrease in theoretical market value. The general requisition (in April 1942) did not take place until this partial reduction had been accomplished, so that requisition prices should presumably not reflect all of the exorbitant increase in rates, even if the "enhancement" clause be disregarded.

[14] The court discussed four categories of Government activity, and as to three of them found it impossible to deter-

on, and be borne by, the shipowner. The burden of proving the elements of just compensation is always on the claimant,[15] and one significant qualification of just compensation for merchant ships is that it may not include "enhancement of value resulting from the government's special or extraordinary demand for the property." *United States* v. *Cors*, 337 U. S. 325, 333. Nor is it any novelty in a just compensation case for the owner to be required to show that his claim encompasses only permissible demands. See, *e. g.*, *United States* v. *Toronto, H. & B. Nav. Co.*, 338

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mine the extent of their influence (see *supra*, pp. 6–8, 9–10) :—As to the *first* (relating to the carriage of military shipments in vessels not controlled by the armed services), it found it "impossible to determine accurately how much of this Army tonnage was carried by commercial ships" (R. 51). See also Finding 17 (R. 66), to the same effect.

On the *third* (importation for civilian account of defense commodities), the court also found it impossible "to determine the extent to which the defense program of the United States or the intervention of the Maritime Commission to find shipping space for civilian importers, increased imports into the United States and thus increased the earnings and prices of ships" (R. 51–52). Finding 18 (R. 68), is to the same effect.

The court also failed to determine the extent of the enhancement attributable to the *fourth* category (importation of commodities for stockpiling purposes). See R. 52, and F. 20, R. 72.

[15] See *Marion & Rye Valley Ry. Co.* v. *United States*, 270 U. S. 280, 285; *United States ex rel. T. V. A.* v. *Powelson*, 319 U. S. 266, 273; *United States* v. *Felin & Co.*, 334 U. S. 624, 631, 641–642; *United States* v. *Toronto, H. & B. Nav. Co.*, 338 U. S. 396, 406; *United States* v. *Commodities Trading Corp.*, 339 U. S. 121, 128.

U. S. 396, 406; *United States* v. *Commodities Trading Corp.*, 339 U. S. 121, 128.

Although the proof presented by the United States indicated that between 44% and 80% of the increased value was due to the Government's defense and war need for shipping space in dry-cargo merchant vessels (Tr. 385) (*supra*, p. 9), the court found that there was no improper enhancement at all, solely because it could not determine "how much" or the "extent" to which the prohibited factors played a role. Instead, the obligation and risk of proving specific amounts and percentages should have been placed squarely on the claimant. If that had been done, the Court of Claims would clearly have been unable to conclude that the 350% increase in the value of the *International* contained no appreciable element of forbidden inflation. Cf. *United States* v. *Cors*, 337 U. S. 325, 336.[16]

4. A second major error vitiating the court's findings is its basic assumption that only actual cargo movements before June 1941 (the peak of the market (R. 54)) should be considered (R. 52).[17] For instance, the effect of the lend-lease

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[16] If certiorari is granted, we shall also maintain that, apart from its error as to the burden of proof, the Court of Claims erred in finding that it could not reasonably determine, on the record before it, the amount of prohibited enhancement flowing from each of the four factors discussed in its opinion.

[17] Other serious errors were (i) the grave overemphasis on "the general expansion of business in the United States from 1939 to 1941" as related to the specific increase in ship prices

program was minimized by the court because few cargoes were shipped between March 1941 (when the Lend-Lease Act became law) and June 1941. See R. 52, and Finding 19, R. 70. But the economic truth is that ship prices respond, not to the value of freight actually loaded during a particular period, but to the total carriage *anticipated* by the owners in the foreseeable future.[18] See Finding 5, R. 56. In 1940 and 1941, this country's involvement in World War II—if only as arsenal of the allied forces—was plain to all, and the current expectation, by the public and shipowners alike, was for steadily increasing transoceanic shipments of supplies. The Government's expanded need for shipping could be, and was, calculated by the owners and then substantially reflected in ship prices. If the scope of this

(R. 49); (ii) the underlying assumption—despite the wide existence of Government contracts and subcontracts—that "private" purchases during this period were unrelated to the Government's defense program and needs (R. 49), and, in particular, (iii) the erroneous assumption that in this period there was a very substantial body of imports "for the purpose of building up a civilian supply of materials for use in normal trade channels in the manufacturing of goods for civilian use * * *" (R. 51). The court's finding as to the use of commercial cargo vessels by the armed services (Finding 17, R. 66) is also plainly erroneous.

[18] One of the Government witnesses testified, as an illustration, that there was a strong upward trend in all prices immediately upon the outbreak of hostilities in Korea even though the actual placement of Government contracts was relatively small during the first year of the hostilities (Tr. 2311).

need, as it appeared at that time, had been fully taken into account, the Court of Claims would not have reached the clearly incorrect judgment it did.[19]

The end-result of the Court of Claims' mistaken dissection of the individual components of prohibited "enhancement," together with its reversal of the burden of proof, is the plainly erroneous result that a value increase of over 300% reflects no enhancement due to the war needs which ultimately brought about the vessel's taking. This unsatisfactory conclusion wholly frustrates Congress' command, expressed in the "enhancement" clause, to eliminate excessive wartime rises in ship values. See *supra*, pp. 11–15.

CONCLUSION

For the reasons stated, it is urged that this cross-petition for a writ of certiorari be granted if the petition of the Smith-Douglass Company, Inc., should be granted in No. 732, so that all aspects of the related issues of just compensation may be reviewed. The shipowner received more than it was entitled to—not less.

Respectfully submitted.

SIMON E. SOBELOFF,
Solicitor General.

APRIL 1954.

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[19] The Government presented figures from which such an estimate could be drawn, and expert witnesses whose testimony would enable the court to revise its findings in this respect. See, *e. g.*, Tr. 395.

APPENDIX

The pertinent provisions of the Merchant Marine Act, 1936, 49 Stat. 1985, as amended, 46 U. S. C. 1242, are as follows:

> SEC. 902. (a) Whenever the President shall proclaim that the security of the national defense makes it advisable or during any national emergency declared by proclamation of the President, it shall be lawful for the Commission to requisition or purchase any vessel or other watercraft owned by citizens of the United States, or under construction within the United States, or for any period during such emergency, to requisition or charter the use of any such property. The termination of any emergency so declared shall be announced by a further proclamation by the President. When any such property or the use thereof is so requisitioned, the owner thereof shall be paid just compensation for the property taken or for the use of such property, but in no case shall the value of the property taken or used be deemed enhanced by the causes necessitating the taking or use. If any property is taken and used under authority of this section, but the ownership thereof is not required by the United States, such property shall be restored to the owner in a condition at least as good as when taken, less ordinary wear and tear, or the owner shall be paid an amount for reconditioning sufficient to place the property in such condition. The owner shall not be paid

for any consequential damages arising from a taking or use of property under authority of this section.

(b) When any vessel is taken or used under authority of this section, upon which vessel a construction-differential subsidy has been allowed and paid, the value of the vessel at the time of its taking shall be determined as provided in section 802 of this Act, and in determining the value of any vessel taken or used, on which a construction-differential subsidy has not been paid, the value of any national defense features previously paid for by the United States shall be excluded.

(c) If any property is taken and used under authority of this section, but the ownership thereof is not required by the United States, the Commission, at the time of the taking or as soon thereafter as the exigencies of the situation may permit, shall transmit to the person entitled to the possession of such property a charter setting forth the terms which, in the Commission's judgment, should govern the relations between the United States and such person and a statement of the rate of hire which, in the Commission's judgment, will be just compensation for the use of such property and for the services required under the terms of such charter. If such person does not execute and deliver such charter and accept such rate of hire, the Commission shall pay to such person on account of just compensation a sum equal to 75 per centum of such rate of hire as the same may from time to time be due under the terms of the charter so tendered, and such person shall be entitled to sue the United States to recover such further sum as added to such

75 per centum will make up such amount as will be just compensation for the use of the property and for the services required in connection with such use. In the event of loss or damages to such property, due to operation of a risk assumed by the United States under the terms of a charter prescribed in this subsection, but no valuation of such vessel or other property or mode of compensation has been agreed to, the United States shall pay just compensation for such loss or damage, to the extent the person entitled thereto is not reimbursed therefor through policies of insurance against such loss or damage.

(d) In all cases, the just compensation authorized by this section shall be determined and paid by the Commission as soon as practicable, but if the amount of just compensation determined by the Commission is unsatisfactory to the person entitled thereto, such person shall be paid 75 per centum of the amount so determined and shall be entitled to sue the United States to recover such further sum as, added to said 75 per centum, will make up such amount as will be just compensation therefor, in the manner provided for by section 24, paragraph 20, and section 145 of the Judicial Code (U. S. C., 1934 edition, title 28, secs. 41, 250).

* * * * *

(e) The Commission is authorized to repair, recondition, reconstruct, and operate, or charter for operation, any property acquired under authority of this section. The Commission is further authorized to transfer the possession or control of any such property to any department or agency of the Government of the United States

upon such terms and conditions as may be approved by the President. In case of any such transfer the department or agency to which the transfer is made shall promptly reimburse the Commission for its expenditures on account of just compensation, purchase price, repairs, reconditioning, reconstruction or charter hire for the property transferred. Such reimbursements shall be deposited in the construction fund established by section 206 of this Act.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

No. 60

UNITED STATES OF AMERICA, *Petitioner*

v.

SMITH-DOUGLASS COMPANY, INC.

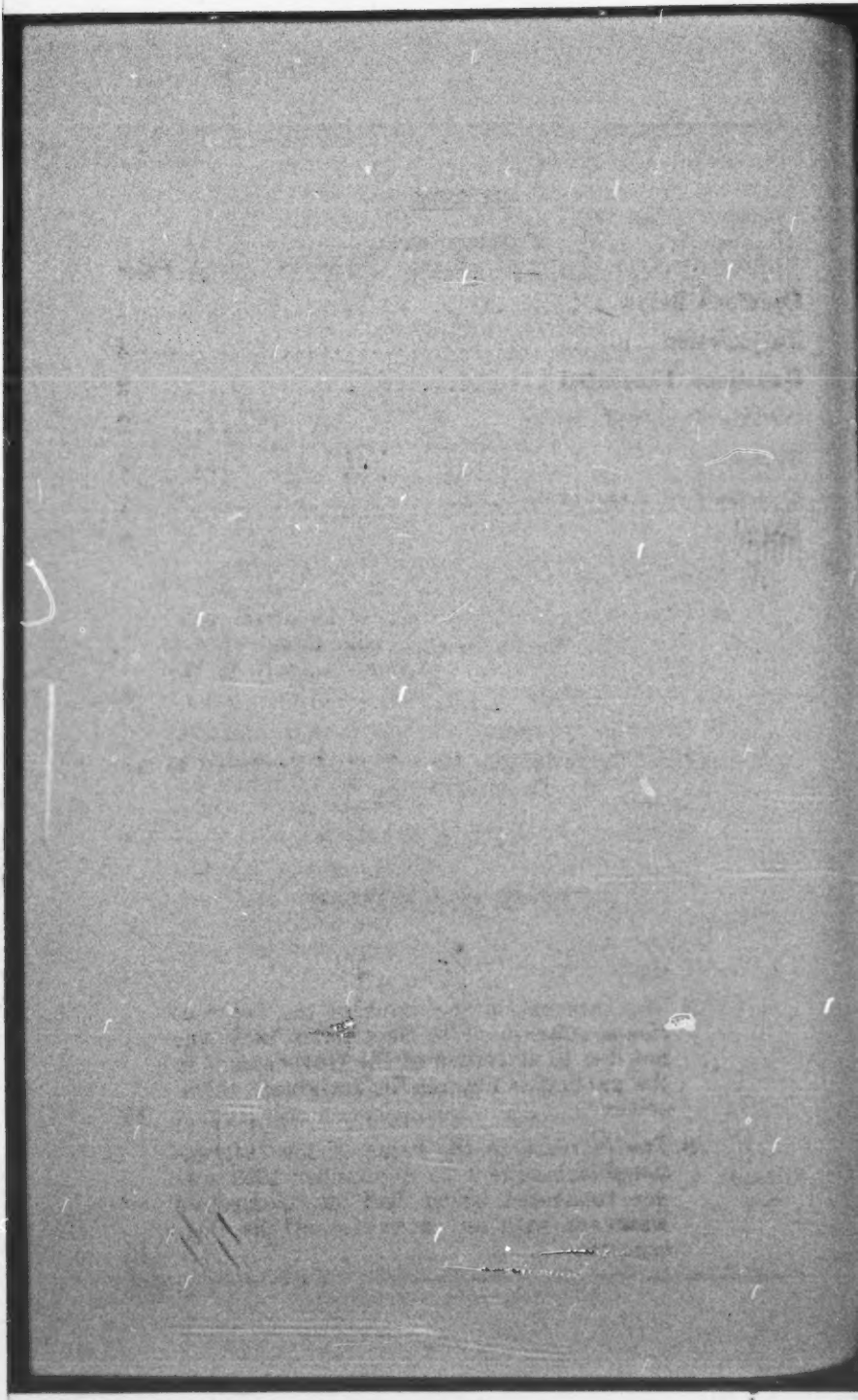
On Conditional Cross-Petition for a Writ of Certiorari to the Court of Claims

BRIEF IN OPPOSITION

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BRIEF IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Claims rendered on December 6, 1948, is reported in 81 F. Supp. 215. The opinion of the Court of Claims rendered on December 1, 1953, reaffirming the decision of December 6, 1948, is reported in 116 F. Supp. 570.

JURISDICTION

The original judgment of the Court of Claims was entered on December 6, 1948 (R. 12). The judgment of the Court of Claims, on remand, reaffirming the decision of December 6, 1948, was entered on December 1, 1953 (R. 47). The time allowed cross-petitioner for filing a petition for a writ of certiorari was extended by this Court to and including April 30, 1954 (R. 77). The jurisdiction of this Court is invoked under Title 28, U.S.C. Sec. 1255.

QUESTIONS PRESENTED

The questions presented by the Government's conditional cross-petition for certiorari are:

I. Whether, in valuing respondent's oceangoing dry-cargo vessel INTERNATIONAL, "the court below erroneously made an award which * * * included enhancement due to the causes which necessitated the taking"; and

II. Whether "the court below erred in holding that the burden of proving the amount of prohibited enhancement rests upon the United States rather than upon the plaintiff".

STATUTE INVOLVED

The relevant portions of the Merchant Marine Act of 1936, as amended, 53 Stat. 1255, 46 U.S.C. Sec. 1242, are set forth in the Appendix to the conditional cross-petition (pp. 23-26).

STATEMENT

A statement of the case relating to the history of the INTERNATIONAL, including its purchase by respondent, its requisition by the Government and its valuation by the Commissioner and the court below, is set forth in respondent's petition for certiorari in No. 56 (October Term, 1954), to which the Court is respectfully referred. The

facts pertinent to the issues raised by the conditional cross-petition, as they appear from the findings of the court below are as follows:

After the court below entered its former judgment, holding that "the fair and reasonable value of the INTERNATIONAL and all equipment and spare parts taken by the Government was, on October 6, 1943, $290,000",[1] this Court handed down its decision in *United States* v. *Cors*, 337 U.S. 325 (June 13, 1949). Both respondent and the Government then filed motions for a new trial, respondent contending that the award was inadequate and the Government claiming that the award included "deductible enhancement" which was required to be excluded under the "enhancement clause" of Section 902(a) of the Merchant Marine Act of 1936, as amended, *supra* (R. 23-24).[2] On October 3, 1949, without referring specifically to either motion, the court below ordered the case remanded to the Commissioner "for the purpose of receiving evidence as to what amount, if any, should be deducted from the valuation heretofore found by this court to bring the valuation into compliance with the decision of the Supreme Court in the *Cors* case * * * " (R. 25).

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[1] At page 4 of its conditional cross-petition the Government erroneously states that the court below evaluated the INTERNATIONAL "at $290,000, or $66.87 a deadweight ton for the 4370 ton ship" (also see pages 9, 10). While the court below found that at the time of title requisition the vessel was in need of repairs at the reasonable cost of $17,675, so that the *sound condition* value of the ship was $292,232.18, or $66.87 per deadweight ton, exclusive of spare parts and equipment (F. 1, R. 54), the court's award to respondent was on an *as is* basis, amounting to $274,557.18, or $62.83 per deadweight ton, for the vessel itself, plus $15,442.82 for the equipment and spare parts (F. 14, 16; R. 17).

[2] The letter "F" designates the number of the court's or Commissioner's findings; "R" designates the record page number; and "Tr. R" designates the page of the transcript of testimony in the second hearing, filed as a part of the record herein but not printed in connection with the petition or cross-petition for certiorari.

Further hearings were held, and on August 4, 1952, the Commissioner filed his report, stating that no element of deductible enhancement was included in the amount previously determined by the court below (R. 25-47). On December 1, 1953, the court below handed down its decision, on remand, adhering to and reaffirming its former judgment of December 6, 1948, and holding that its prior valuation of the INTERNATIONAL included no element of deductible enhancement (R. 47-75).

SUMMARY OF ARGUMENT

Neither of the questions presented by the conditional cross-petition constitutes grounds specified in Rule 19 of this Court as reasons for the exercise of its discretionary power to grant certiorari.

I. The first question is solely one of fact. This Court has repeatedly stated that it will not grant certiorari merely to review the evidence in a case where no question of law is involved.

Moreover, the concurring findings of evidentiary or primary facts by the Commissioner and the court below, as well as their concurring ultimate finding that no element of deductible enhancement was included in the INTERNATIONAL's valuation, were fully supported by the preponderant weight of the evidence of record.

II. The second question set forth in the cross-petition is not properly before this Court. The court below did *not* hold "that the burden of proving the amount of prohibited enhancement rests upon the United States rather than upon the plaintiff", as the conditional cross-petition erroneously states (page 2). This Court does not review an issue which was not ruled upon nor even raised in the court below.

Even if the court below had held "that the burden of proving the amount of prohibited enhancement rests upon the United States rather than upon the plaintiff", as the conditional cross-petition erroneously states, such a hold-

ing would have been proper. Market price alone was used by the court below in arriving at its valuation of the INTERNATIONAL. Since market price at the time of taking constitutes the *prima facie* measure of just compensation for requisitioned property, the party claiming that such is not true in a particular case must bear the burden of proof.

Finally, as a practical matter, it is of no importance whether the burden of proof was on cross-petitioner or on respondent. Both sides put on affirmative evidence to show the causes of the increase in freighter prices subsequent to September 1939. After carefully reviewing all the evidence, both the Commissioner and the court below found *as a fact* that no element of deductible enhancement was included in the valuation previously determined by the court.

ARGUMENT

I. FIRST QUESTION

A. PETITIONER'S FIRST QUESTION IS IN DIRECT CONFLICT WITH THE PRACTICE OF THIS COURT OF NOT GRANTING A WRIT OF CERTIORARI MERELY TO REVIEW THE EVIDENCE IN A CASE.

The first question presented in the cross-petition, namely, "whether the court below erroneously made an award which * * * included enhancement due to the causes which necessitated the taking", is solely one of fact, as counsel for the Government has conceded (Tr. R. 973). That question of fact has thrice been decided against cross-petitioner, once by the Commissioner and, as the cross-petition admits (page 10), twice by the court below.[3] The court below de-

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[3] In the first hearing the Commissioner was properly not faced with the question of possible deductible enhancement, since that issue can only arise where market prices are used as the measure of just compensation. *United States* v. *Cors, supra,* 337 U.S. at 333-334. Having found that there were no sales of comparable ships at or about the time of taking (F. 10, R. 10), the Commissioner used reproduction cost new less depreciation as the measure of just compensation (F. 16, R. 11).

The entire question of whether the award of the court below

voted approximately twenty-five days to the rehearing which was limited solely to the deductible enhancement question. Twenty-four witnesses were heard, sixteen for the Government and eight for respondent. The testimony on that question alone covered 2,598 pages of transcript and eighty-seven exhibits were introduced in evidence, sixty-one for the Government and twenty-six for respondent. After carefully reviewing all the evidence, the Commissioner and the court below both found *as a fact* that the court's previous valuation of the INTERNATIONAL contained no element of deductible enhancement. Cross-petitioner now asks this Court to review the voluminous evidence and

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included deductible enhancement is the result of the erroneous action of that court in basing its award upon the April 1942 market value of comparable ships, which value had been deliberately depressed by the Government for the express purpose of requisitioning vessels at prices lower than the Government would have been required to pay otherwise. Furthermore, the April 1942 market value used by the court below was based upon the sale of a single vessel eighteen months prior to the date of the requisitioning here involved.

The Government itself urged the use of the April 1942 market value in the court below, whereas respondent (Smith-Douglass Company) contended below and still contends in its petition before this Honorable Court (No. 56, October term, 1954) that the April 1942 value was not a fair measure of just compensation because it had been deliberately depressed by the Government for the express purpose of requisitioning vessels and also because it was too remote from the date of requisitioning and was not based upon a sufficient number of sales. Respondent urged below and is still urging before this Honorable Court that the other criteria of value, which were before the court below, such as reproduction cost new less depreciation, acquisition cost, insurance value and opinions of experts, should have been considered. If the court below had accepted the Commissioner's finding that reproduction cost new less depreciation was the best measure of just compensation, there would have been no problem of deductible enhancement since the value so determined was based upon costs reflecting the general level of economic activity at the date of requisitioning.

to redetermine the facts relating to the deductible enhancement question.

While this Court has authority to review judgments of the Court of Claims and under that authority may determine whether there is substantial evidence to sustain the lower court's findings of fact, *United States* v. *Penn Foundry & Mfg. Co.*, 337 U.S. 198, 207, fn. 4 (1949), this Court has stated that it will not *exercise* that authority and grant a writ of certiorari merely to review the evidence in a case. *United States* v. *Johnston*, 268 U.S. 220, 227 (1925); *General Talking Pictures Corp.* v. *Western Electric Co.*, 304 U.S. 175, 178 (1938). The authority "was not conferred upon this court merely to give the defeated party • • • another hearing". *Magnum Import Co.* v. *De Spoturno Coty*, 262 U. S. 159, 163 (1923).

B. THE CONCURRING FINDINGS OF THE COMMISSIONER AND OF THE COURT BELOW THAT NO DEDUCTIBLE ENHANCEMENT WAS INCLUDED IN THE VALUATION DETERMINED FOR THE INTERNATIONAL WERE CONCLUSIVELY ESTABLISHED BY THE EVIDENCE.

Since cross-petitioner's first question is based upon a review of the evidence, its argument in support of the cross-petition is essentially an argument on the merits. Every point urged by cross-petitioner was fully considered and covered by specific findings of fact by both the Commissioner and the court below. In order to answer cross-petitioner's argument on the merits, it is necessary to review the "facts" urged by cross-petitioner and to indicate the conclusions reached by the Commissioner and the court below with respect to each contention.[4]

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[4] The cross-petition contains numerous statements of alleged facts which were specifically considered and rejected by the court below. For example, the following statement appears on page 6 of the cross-petition: "There was also evidence that the Navy's requirement for 1941 amounted to an additional 500,000 to 700,000 tons (Tr. 570-572)." Both the Commissioner and the court below found that "*there was no reliable evidence as to the extent of the*

1. The increase in the value of the INTERNATIONAL subsequent to September 1939 was not due to activities of the Government in the market for dry-cargo ocean transportation.

With respect to the increase in the value of the INTERNATIONAL, as well as of comparable ships, between September 1939 and June 1941, the Government did not assert or attempt to show that there was any enhancement whatever arising from "the previous taking of vessels of similar type" or due "to a prospective taking, reasonably probable" (F. 4, R. 28; F. 4, R. 56; R. 50).

As cross-petitioner indicates (p. 13 of conditional cross-petition), its entire case on the deductible enhancement question is based upon an attempt to show that the Government's intervention in the shipping market resulted in a substantial increase in ship values between September 1939 and June 1941. The Government's case in the court below was built upon the following four general contentions which are still being urged in the conditional cross-petition, all of which were considered and rejected by the court below:

> (1) That freighter prices in the domestic market between September 1939 and June 1941, when the peak in the market was reached, were enhanced by alleged Government activities in the market for dry-cargo

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Navy's requirement for shipping space over and above its available tonnage" (Emphasis supplied). (F. 17, R. 40; F. 17 R. 68). Likewise, the cross-petition states at page 16 that "it is known to everyone, and borne out by the record and findings below (R. 66-74) (*supra*, pp. 6-8), that long before we entered World War II the Government's defense and allied-aid program was making large and increasing use of ocean shipping." The court below found that the only need of the Government for cargo space, even if that need was covered by the statutory language "causes which necessitated the taking", was for the carriage of Government stockpile imports and Lend-Lease exports and that "the amounts of such cargo were small, in relation to the total shipping of the period * * *." (R. 53)

ocean transportation by freighters in order to obtain the carriage of (a) military exports, (b) basic commodity imports for civilian account, (c) Lend-Lease exports, and (d) stockpiling imports for Government account;

(2) That it is possible to ascertain with reasonable accuracy the *extent* to which freighter prices between September 1939 and June 1941 were enhanced by the Government's alleged activities in the market for dry-cargo ocean transportation by freighters;

(3) That such enhancement is "deductible"; and

(4) That the same measurable degree or amount of deductible enhancement which existed in the June 1941 prices was also present in the "fair and reasonable value" of the INTERNATIONAL on October 6, 1943, as fixed by the court below.

With respect to the first contention above, even if it is assumed that the activities of the Government in the market *for dry-cargo ocean transportation by freighters* during the period 1939 to mid-1941, as distinguished from activities in the particular market *for the purchase and sale of ships*, are within the "particular market" limitation of this Court's decision in the *Cors* case, *supra*, 337 U.S. at 334-335, which the court below did not decide (R. 53), so that such activities are relevant to this case (R. 66), such activities could not and did not in fact cause a measurable or substantial increase in ship prices (R. 53). As stated above, cross-petitioner endeavored to show that the Government acted in the market for dry-cargo ocean transportation by freighters by providing those vessels with cargo of four different categories (F. 16, R. 38; F. 16, R. 66).

The first category, allegedly consisting of military dry-cargo shipments to overseas bases (see cross-petition, p. 6, p. 18 fn. 14), was dealt with in detail by both the Commissioner and the court below (F. 17, R. 38-40; F. 17, R.

66-68). Cross-petitioner introduced no evidence whatever as to the amount of such cargo actually shipped to overseas bases during the period 1939 to mid-1941 or during any other period, but was content merely to introduce military estimates of the quantities of cargo which *might in the future* be shipped on commercial freighters. As both the Commissioner and the court below found, the record contains nothing whatever regarding the amounts, if any, of such cargo *actually* shipped during the period in question on commercial freighters, whether foreign or domestic. The conclusion of both the Commissioner and the court below that these estimated quantities were probably carried on the military's own ships rather than on merchant freighters, and their concurring findings that these alleged carryings did not enhance United States-flag ship earnings and values are clearly supported by the record.

The second category, or type of cargo which the Government allegedly provided to American-flag merchant freighters consisted of basic commodity imports (see cross-petition p. 7, p. 18 fn. 14). This category was dealt with in detail by both the Commissioner and the court below (F. 18, R. 40-42; F. 18, R. 68-70), so that it is sufficient here to merely state that the basic commodities consisted of those commodities which are fundamentally necessary to the normal operation of this country's economy, whether in time of war or of peace. Although all imports of basic materials between 1939 and mid-1941 were for civilian account and no funds were spent by the Government either on the purchase price or to pay freight rates thereon, with the exception of that small portion imported by the Government for stockpiling purposes (*infra,* page 12.) (F. 18, R. 41; F. 18, R. 69), cross-petitioner asserted and continues to assert that the major portion of the increase in such imports during this period was actually due to United States defense appropriations and was used to fulfill Government contracts for the manufacture of war material (cross-petition, pp. 7, 17, 18 fn. 14). Notwithstanding un-

supported statements in the cross-petition that "much of the need for these commodities arose from the Government's letting of defense contracts" (p. 8) and "immense quantities of strategic and critical materials * * * were imported for Government account or to fill Government defense contracts" (p. 17), the fact remains that the Government failed to offer any evidence whatever regarding the amounts of these commodities imported and used for such purposes. The Commissioner and the court below both found that "The extent to which consumption of such commodities up to mid-1941 resulted from defense appropriations and letting of Government contracts for manufacture of war materiel cannot be determined with any degree of reasonable approximation" (F. 18, R. 42; F. 18, R. 70). Moreover, the Goverment's contention is directly contrary to the concurring findings of the Commissioner and the court below to the effect that the outbreak of the war in Europe in September 1939 caused an immediate and marked expansion in this country's economic activity, and that the German invasion of the Scandinavian countries in April 1940 and subsequent developments in Europe resulted in a further and "tremendous" expansion of business activity in the United States (F. 11, R. 32; F. 11, R. 60). This increased business was not due to any activity of this Government, but resulted from the fact that Europe was cut off from the rest of the world, especially after the fall of France and the German occupation of most of Western Europe, and Great Britain's activities were confined to those directly connected with the European war, so that this country became the world's main source of manufactured goods and its main market for raw materials (F. 12, R. 34; F. 12, R. 62). There was no Government curtailment whatever of civilian production until after the peak in ship values in June 1941 (F. 18, R. 42; F. 18, R. 70). The basically civilian character of our economy during the entire period in question was succinctly stated by the court below as follows (R. 49):

"* * * Federal Government purchases of goods and services for war purposes also increased in this early period, but the amounts of these purchases were small in comparison with those relating to private business. * * *"

The third category or type of cargo which the Government allegedly furnished to American-flag merchant freighters was the cargo shipped abroad under the Lend-Lease Act of March 11, 1941, c. 11, 55 Stat. 31 (cross-petition, p. 6). The details of this program and the quantities shipped thereunder are fully described in the concurring findings of the Commissioner and the court below (F. 19, R. 42-44; F. 19, R. 70-72).

The total ocean freighter carrying (all flags) of the dry-cargo export and import traffic in long tons in the foreign trade of the United States amounted to 49.8 million tons in 1941, of which American-flag freighters carried 21.1 million tons (F. 12, R. 33-34; F. 12, R. 61-62), and only 123,530 tons of Lend-Lease cargo moved during the first half of 1941 (F. 19, R. 44; F. 19, R. 72). In view of these statistics, the court below correctly found that "The carriage of this relatively small amount of cargo would have had no substantial effect upon the market for ships" (R. 52).

The fourth category or type of cargo which the Government allegedly furnished to American-flag merchant freighters was that portion of the basic commodity imports which was actually purchased and imported by the Government for stockpiling purposes, beginning in the third quarter of 1940 (cross-petition, pp. 7, 18 fn. 14). Such imports amounted to 87,360 tons in the second half of 1940 and approximately 500,000 tons in the first half of 1941, although the record contains no evidence as to whether these imports were carried on American-flag or foreign-flag ships (F. 20, R. 45-46; F. 20, R. 73-74). The details of the Government's stockpiling program and the quantities actually imported are set forth in detail in the concurring findings of the Commissioner and the court below (F. 20, R. 44-46; F. 20, R. 72-74).

With respect to the Government's second and third contentions (*supra*, p. 9), the court below correctly concluded that none of the INTERNATIONAL's increase in value from September 1939 to mid-1941, when the peak in prices in the domestic market was reached, was caused by the alleged carriage of military exports to overseas bases (the first category described above) or by the alleged carriage of basic commodities imported by civilian business (the second category described above) (R. 51-52). With respect to the exportation of Lend-Lease supplies (the third category described above) and the importation of commodities for stockpiling by the Government (the fourth category described above), the court below concluded that, *even if such activities might be regarded as covered by the statutory language "causes which necessitated the taking" which the court below did not decide,* "the amounts of such cargo were small, in relation to the total shipping of the period, and the amount of the enhancement would have been small" (R. 53).

With respect to the Government's fourth contention (*supra*, p. 9), the court below found that as a result of "the Government's deliberate and successful effort to depress the price of ships" under the Ship Warrants Act of July 14, 1941, 55 Stat. 591, 50 War Appendix U.S.C., Secs. 1281, *et seq.*, "prices fell much more than the amount of any possible enhancement which had theretofore taken place as a result of [Lend-Lease and stockpiling] activities", with the result that no element of such enhancement, even if deductible, was present in the court's prior valuation of the INTERNATIONAL which was "substantially the April 1942 market value" (R. 53).

The conclusion of the court below that, *even if the Government's Lend-Lease and stockpiling activities could be regarded as covered by the statutory language "causes which necessitated the taking",* "the amounts of such cargo were small in relation to the total shipping of the period, and the amount of the enhancement would have been small",

is fully supported by the record (R. 53). The correctness of this conclusion is all the more apparent in view of the undisputed fact that this Government business, whatever the amount, was of necessity displacing regular commercial cargoes which were available in large quantities and which ship operators preferred to carry because they were more profitable than the generally low-paying Government cargoes (F. 20, R. 46; F. 20, R. 74). Thus, the carriage of Government cargoes actually had the effect of decreasing ship earnings and values from what they would otherwise have been, rather than of increasing such earnings and values. The accuracy of this proposition is obvious from the uncontradicted evidence in the record that the Government had to use pressure to get its commodities moved and that it was only by the use of appeals to patriotism and "jawbone" intervention that the Government was ever able to get space.

The "enhancement exception" was intended to eliminate only those increases in value which were due solely to Government activity in the *particular market* and then *only to the extent that it caused unfair price increases which would not have occurred had the Government not acted in that market.* It is clear that the Government's activity in the ocean transportation market to obtain carriage of Lend-Lease exports and stockpiling imports, whatever the quantities carried, was not the cause of any increase in earnings and a resultant "spiraling" of prices, for the simple reason that ship earnings would have been as much or more from regular commercial business had the Government completely stayed out of the market. The Government simply substituted the carriage of its low-rate cargoes for the carriage of available higher-paying regular commercial cargoes.

2. The increase in the value of the INTERNATIONAL subsequent to September 1939 was not due to activities of the Government in the particular market for freighters themselves.

As distinguished from the Government's alleged activities in the commodities and other markets and the resultant alleged need of the Government for cargo space, the Commissioner and the court below made specific findings with regard to the Government's activities in the *particular market* for freighters themselves during the period 1939 to mid-1941 (F. 15, R. 36-38; F. 15, R. 64-66). They found that these consisted of six different types of activities in the freighter market, of which five served to increase the supply of active freighters and thus to decrease the earnings and values of American-flag freighters. They further found that *"The net effect of these activities was to increase the supply of ships, and therefore tended to depress the values instead of to enhance the values of American-flag freighters"*, but that such net effect was "not susceptible of even an approximate measurement" (F. 15, R. 36; F. 15, R. 64). (Emphasis supplied)

3. The increase in the value of the INTERNATIONAL subsequent to September 1939 was due to causes which had no connection whatever with any activities of the Government.

During the second hearing the respondent affirmatively showed, and the Commissioner and the court below found, that the rise in freighter earnings and values between September 1939 and June 1941 was due to numerous and powerful factors which had no connection whatever with any activities of this Government, whether in the particular market for the purchase and sale of freighters or in the market for ocean transportation by freighters. Briefly, these factors were:

(a) *Foreign-Flag War Losses.*—By mid-1941, when the peak in domestic freighter prices were reached, about 30 per cent of the allied and neutral merchant dry-cargo fleets

as they existed on September 1, 1939 had been sunk or destroyed due to the European war; no American-flag vessels were lost until December 1941, so that the chief beneficiaries of the decreased supply and the resultant increased value were owners of United States-flag ships (F. 7, R. 29-30; F. 7, R. 57-58).

(b) *War Conditions.*—A number of conditions which resulted from the European war contributed to lower efficiency in freighter operations and caused, in effect, a decrease in the available world supply of commercial cargo space and a resulting increase in freighter values (F. 8, R. 30; F. 8, R. 58).

(c) *Private Sales to Foreigners.*—Between October 26, 1939 and mid-1941 the supply of privately-owned American-flag freighters was reduced by the sale to foreigners of approximately 165 United States-flag dry-cargo ships of over 2,000 gross tons each (F. 9, R. 30; F. 9, R. 58), clearly a substantial portion of the total American-flag merchant fleet which on September 30, 1939 consisted of only 832 freighters, each of 1,000 or more gross tons, including both privately-owned and Government-owned ships (F. 6, R. 29; F. 6, R. 57). Since the European war caused more and more of the foreign-flag freighters to be withdrawn from regular commercial use (F. 10, R. 30-31; F. 10, R. 58-60), the sales of these ships to foreigners effectively reduced the *world's supply* of *commercial* freighters and resulted in increased earnings and values for the remaining American-flag freighters.[5]

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[5] The Commissioner and the court below both specifically found that "Sales of American-flag vessels to alien buyers were forbidden by Section 9 of the Shipping Act, 1916, unless approved by the United States Maritime Commission (46 U.S.C. Sec. 808)" and that these sales were permitted by the Commission because it was deemed desirable to get rid of what at that time was thought to be "excess" tonnage (F. 9, R. 30; F. 9, R. 58). *Obviously, the Commission's approval of the sale of these ships is inconsistent with the Government's present contention that the Government had need for dry-cargo ships or space prior to mid-1941.*

(d) *Withdrawal of Foreign-flag Vessels from Commercial Trades.*—Subsequent to September 1939 more and more of the European countries became involved in the war and their merchant fleets were required for war purposes and thus removed from commercial service, so that "*By the fall of 1940 about 75 per cent of the total world dry-cargo tonnage as it existed on September 1, 1939, was no longer neutral tonnage to be employed freely in normal commercial operations, and of the remaining neutral dry-cargo tonnage, approximately one-half was under United States flag*" (F. 10, R. 31; F. 10, R. 59). (Emphasis supplied) This withdrawal of foreign-flag ships from commercial trades "*substantially* increased the earnings and values of United States-flag dry-cargo ships" (F. 10, R. 32; F. 10, R. 60). (Emphasis supplied)

(e) *Improved Business Conditions.*—During the period 1939 to mid-1941 the earnings and values of American-flag freighters was increased by the "greatly increased improvement in business generally" in this country which "led to increased earnings for all types of business, *especially for the transportation industry, of which shipping is an integral part* * * *" (F. 11, R. 32-33; F. 11, R. 60-61). (Emphasis supplied). During this period "Federal Government purchases of goods and services for war purposes * * * were small in comparison with those relating to private business" (R. 49).

(f) *Increased Carryings of United States Freighters Due to European War.*—Although the total ocean freighter carrying (all flags) of the dry-cargo export and import traffic in the foreign trade of the United States remained relatively constant during the years 1939, 1940 and 1941, the *proportion* of the foreign trade traffic carried on American-flag freighters during these three years "increased sharply" (F. 12, R. 33-34; F. 12, R. 61-62). The increased carryings of United States-flag freighters "did not include munitions of war or other traffic to or from the combat zones in Europe", but consisted of cargoes to and from

areas outside of war zones (R. 34; R. 62). The increased carryings were due, not only to the decline in foreign-flag competition, but also to the fact that "As Europe was cut off as a source of supply for manufactured goods, and as a market for raw materials, the trade of the remainder of the world in general tended to flow to and from the United States" (R. 34; R. 62). As a result of the "great increase in the volume of [American-flag freighter] carryings in the foreign trade of the United States", demonstrative of the "greatly increased demand" for American-flag ships, there was a "resulting increase in values of United States-flag freighters" (R. 33; R. 61).

(g) *Increased Profits Due to Greater Utilization of Freighter Space.*—During the period in question there was a "greatly increased utilization of freighter space", as evidenced by the fact that "even though the net registered tonnage of ships entering and clearing in the foreign trade fell from about 91 million tons in 1939 to about 62 million tons in 1941, approximately the same amount of cargo tonnage was carried in 1941 as in 1939" (F. 13, R. 34-35; F. 13, R. 62-63). This resulted in *"greatly increased profits* because of the fact that in merchant shipping, as in railroad transportation, greater utilization of carrying space produces increased revenues without a proportionate increase in costs" (R. 34; R. 62). (Emphasis supplied) These "greatly increased profits" obviously served to greatly increase the values of American-flag freighters during the period in question.

(h) *Other Factors.*—Other factors which served to increase the earnings, and hence the values, of American-flag freighters during the period here involved were:

(1) *More Valuable Cargoes.*—The character of cargoes carried became increasingly more valuable and, therefore, more profitable, as shown by the fact that the average value of United States imports and exports per long ton increased from $58.51 in 1939 to $72.53 in 1940 and to $83.70 in 1941 (F. 14(a), R. 35;

F. 14(a), R. 63). This rise "tended to increase vessel earnings and values, because the more valuable the cargo, the better the applicable freight rates, and, therefore, the better the ship's earnings" (R. 35; R. 63). This change from lower to higher-paying cargoes was caused by the European war and resulted from the fact that countries in South America and elsewhere turned to the United States for the finished goods which they had formerly obtained from Europe (R. 34; R. 62). It had nothing whatever to do with any alleged need of the United States Government for dry-cargo ships or for cargo space on such ships, since the Government's alleged demand for space was admittedly for the carriage of low-paying cargoes which ship operators were reluctant to carry, whereas the regular commercial demand was for the carriage of cargo paying the higher freight rates (F. 18, R. 42; F. 20, R. 46; F. 18, R. 70; F. 20, R. 74).

(2) *Decline in Competitive Practices.*—Both the Commissioner and the court below also found that (F. 14(b), R. 35; F. 14(b), R. 63):

"The elimination of competition through the progressive disappearance of belligerent foreign-flag ships theretofore engaged in the commercial trades not only enabled United States-flag vessels to obtain better paying cargoes in both directions, but also reduced competitive practices such as rate cutting, which, in turn, led to increased earnings."

(3) *Increased Shipping Rates.*—Although operating costs increased somewhat during the period in question, "there was a substantial increase in freight and charter rates from the *abnormally low levels* in effect in September 1939, until the passage of the Ship Warrants Act in July 1941" (F. 14(c), R. 35-36; F. 14(c), R. 63-64). (Emphasis supplied) These increased rates had nothing whatever to do with any alleged need of the Government for cargo ships or space on such ships.

Indeed, when the Government did intervene regarding freight rates by means of the Ship Warrants Act, it was to drive rates down which had a depressing, rather than an enhancing, effect on vessel earnings and values (F. 2, R. 26-27; F. 2, R. 54-55; also R. 49, R. 52-53).

The powerful events and factors described above, none of which had any connection whatever with any alleged need of this Government for cargo ships or cargo space, fully explain the increase in the earnings and values of United States-flag freighters during the period in question, although it is manifestly impossible to measure the extent to which *any one* of the factors contributed to the total increase. The very enumeration of these factors places in proper perspective the unimportance of the small amounts of Lend-Lease export and stock-piling import cargoes allegedly carried by American-flag ships during this period.

II. SECOND QUESTION

THE COURT BELOW DID NOT HOLD "THAT THE BURDEN OF PROVING THE AMOUNT OF PROHIBITED ENHANCEMENT RESTS UPON THE UNITED STATES RATHER THAN UPON THE PLAINTIFF". BUT WOULD NOT HAVE BEEN IN ERROR HAD IT SO HELD.

The second question set forth in the conditional cross-petition is not properly before this Court. The court below did *not* hold "that the burden of proving the amount of prohibited enhancement rests upon the United States rather than upon the plaintiff", as the conditional cross-petition erroneously states (page 2). Instead of properly raising the issue and obtaining a ruling at the outset of the rehearing, the Government chose to go ahead with its evidence and, in effect, to assume voluntarily the burden of proof, as the Commissioner pointed out during the course of the rehearing (Tr. R. 1548-1549). This Court has repeatedly stated that it will not review a question which was not properly raised in and passed upon by the court below, except in exceptional cases. *McCullough* v. *Kammerer Corp.*, 323 U.S. 327, 328 (1945); *Helvering* v. *Minne-*

sota Tea Co., 296 U.S. 378, 380 (1935); *Blair* v. *Oesterlein Machine Co.*, 275 U.S. 220, 225 (1927); *Duignan* v. *United States*, 274 U.S. 195, 200 (1927); 54 Am. Jur. Sec. 259, p. 896.

Even if the court below had held "that the burden of proving the amount of prohibited enhancement rests upon the United States rather than upon the plaintiff", as the conditional cross-petition erroneously states, such a holding would have been proper. Since market prices at the time of taking constitute the *prima facie* measure of just compensation for property taken, *Standard Oil Co.* v. *Southern Pacific Co.* [The Proteus], 268 U.S. 146, 155 (1925), *United States* v. *New River Collieries Co.*, 262 U.S. 341, 344 (1923), the party claiming that such is not true in a particular case must bear the burden of proof. Market price alone was used by the court below in arriving at its valuation of the INTERNATIONAL. The principle of deductible enhancement is an exception to the market value standard and, being in the nature of an affirmative defense, imposes on the Government when it claims the benefit of the exception, the burden of establishing both the existence and the amount of any such enhancement in any particular case.

It is obvious that if the rule were otherwise, persons claiming just compensation would fail in their claim unless they were able to carry the almost impossible burden of either negativing the existence of any deductible enhancement resulting from the ever increasing and all pervading needs and activities of the Government or, in cases where some such enhancement might appear, of proving the amount of it. Such an unjust requirement would set both parties and the courts hopelessly adrift on an exceedingly murky "sea of speculation", to use the language of Mr. Justice Frankfurter in his dissent in the *Cors* case, *supra*, 337 U.S. at 334.

Cross-petitioner cites this Court's opinion in the case of *United States* v. *Toronto, Hamilton & Buffalo Navigation Company*, 338 U.S. 396 (1949), as authority for the proposition that the burden of proof in this case should be on

respondent (page 19, fn. 15). In that case, because there was no ascertainable market value, substitute standards of value had to be applied. Although the case was reversed and remanded to the Court of Claims with instructions to reconsider the effect to be given to five sales of car ferries in Florida, three of which had been made to the Government in wartime and were possible subjects for inquiry on enhancement, no instructions whatever were given to the lower court to ascertain whether such sales included any element of deductible enhancement.

The fallacy of contending that the burden of proving deductible enhancement is on the claimant is especially clear in the instant case. Respondent has consistently maintained that, since there were no sales at or about the time of the taking of the INTERNATIONAL, other indicia of value which were before the court below should have been used. Cross-petitioner insisted that sales prices in 1941 and early 1942 were the correct measure of just compensation, and every sale price in the record in this case was brought in by the Government. This information regarding sales prices was solely within the Government's possession and was not available to respondent. Indeed, every effort by respondent to obtain from the Government information regarding sales prices of comparable ships during the period in question was denied. The court below based its valuation of the INTERNATIONAL as of October 6, 1943, solely on sales price, rather than on the other indicia of value which were before it and which were put in evidence by the respondent. Upon rehearing the Government contended below and continues to assert in its cross-petition that the very sales prices, which it introduced in evidence for valuation purposes and upon which the court below exclusively relied, are actually not proper measures of just compensation because they include an element of deductible enhancement, but that it is incumbent upon the claimant to prove the extent to which those prices were unfairly enhanced. Such a contention obviously lacks merit.

Finally, as a practical matter, it is of no importance whether the burden of proof was on cross-petitioner or on respondent. Both sides put on affirmative evidence to show the causes of the increase in freighter prices subsequent to September 1939. After carefully reviewing all the evidence, both the Commissioner and the court below found *as a fact* that no element of deductible enhancement was included in the valuation previously determined by the court. While the court's valuation of the INTERNATIONAL as of the date of requisition admittedly represented a substantial increase over the vessel's abnormally low value in September 1939, both the Commissioner and the court below found from the evidence that the increase was *not* caused by any Government activity in the market for ships themselves (F. 15, R. 36-38; F. 15, R. 64-66), nor by the Government's alleged but largely unproven need for cargo space as a result of its activities in the commodities and other markets (F. 16, 17, 18, 19, 20, 21, R. 38-47; F. 16, 17, 18, 19, 20, 21, R. 66-75), even if such activities could be considered as covered by the statutory language "causes which necessitated the taking", which the court below found it unnecessary to decide (R. 53). Both the Commissioner and the court below *did find* from the evidence that the increase in value was due to causes wholly unrelated to any need of the Government for either freighters themselves or for cargo space (F. 7, 8, 9, 10, 11, 12, 13, 14, R. 29-36; F. 7, 8, 9, 10, 11, 12, 13, 14, R. 57-64).

CONCLUSION

For the reasons herein stated, the conditional cross-petition should be denied.

Respectfully submitted,

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